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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CLIFTON R. WHARTON, JR., ex-Chancellor of the State University of New York, individually and in his official capacity; JOHN MARBURGER, President of the State University of New York at Stony Brook, individually and in his official capacity; HOMER NEAL, Provost of the State University of New York at Stony Brook, individually and in his official capacity; ROBERT NEVILLE, Dean of Humanities and Fine Arts at the State University of New York at Stony Brook, individually and in his official capacity,

Petitioners,

—against—

PROFESSOR ERNEST F. DUBE,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

1. Whether effectuation of this Court's purpose in adopting the objective test articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), requires the application of a standard more demanding of plaintiffs when public officer defendants move for summary judgment on the basis of their qualified immunity in actions where their state of mind is at issue.

2. Whether the evidence adduced by respondent to support his theory of improper motive was sufficient.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iv
OPINIONS BELOW.....	2
JURISDICTION	2
CONSTITUTIONAL AND REGULATORY PROVI- SIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Respondent's Employment At Stony Brook And The 1983 Controversy	3
B. The Review Of Respondent's Candidacy For Tenure And Promotion.....	6
C. The Proceedings Below.....	11
D. The District Court's Decision	14
E. The Court Of Appeals' Decision	15
REASONS FOR GRANTING THE PETITION.....	17
A. The Decision Of The Second Circuit Conflicts With The Decisions Of Other Courts Of Appeals Imposing A Heightened Standard On Plaintiffs Alleging Motive-Based Claims Where Public Official Defendants Seek Summary Judgment As To Qualified Immunity	17
B. The Decision Of The Court Of Appeals Should Be Reversed Under The Standards Governing Summary Judgment Announced By This Court In <i>Matsushita</i>	24

	PAGE
Conclusion.....	30
Appendix:	
Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing	1a
Judgment and Opinion of the United States Court of Appeals for the Second Circuit.....	2a
Memorandum Decision of the United States District Court for the Eastern District of New York	35a
Excerpts from the Record Before the United States District Court for the Eastern District of New York.....	48a
—Documents Regarding Tenure Decision.....	48a
—Documents and Deposition Testimony Regarding 1983 Controversy	78a
Text of Constitutional and Regulatory Provi- sions Involved	88a

TABLE OF AUTHORITIES

Cases	PAGE
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987)	17-19, 23
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	28-29, 30
<i>Butz v. Economou</i> , 438 U.S. 478 (1978)	20
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541 (1949)	2
<i>Collinson v. Gott</i> , 895 F.2d 994 (4th Cir. 1990)	21, 25
<i>Continental T.V., Inc. v. GTE Sylvania, Inc.</i> , 433 U.S. 36 (1977)	23
<i>Cooper v. Ross</i> , 472 F. Supp. 802 (E.D. Ark. 1979) .	26
<i>Crutcher v. Kentucky</i> , 883 F.2d 502 (6th Cir. 1989)	21-22n.14
<i>Feliciano-Angulo v. Rivera-Cruz</i> , 858 F.2d 40 (1st Cir. 1988)	21-22n.14
<i>First National Bank v. Cities Service Co.</i> , 391 U.S. 253 (1968)	22, 24
<i>Gibson v. Greater Park City Co.</i> , 818 F.2d 722 (10th Cir. 1987)	25
<i>Halperin v. Kissinger</i> , 807 F.2d 180 (D.C. Cir. 1986) .	17
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	<i>passim</i>
<i>Harris v. Eichbaum</i> , 642 F. Supp. 1056 (D. Md. 1986)	20n.13
<i>Hishon v. King & Spaulding</i> , 467 U.S. 69 (1984)	26-27
<i>Hobson v. Wilson</i> , 737 F.2d 1 (D.C. Cir. 1984), <i>cert.</i> <i>denied</i> , 470 U.S. 1084 (1985)	20

	PAGE
<i>In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation</i> , 906 F.2d 432 (9th Cir. 1990).....	25
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)..	26
<i>Krohn v. United States</i> , 742 F.2d 24 (1st Cir. 1984)	20, 21-22n.14
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986).....	17, 19
<i>Martin v. D. C. Metropolitan Police Department</i> , 812 F.2d 1425, partially vacated en banc and rehearing granted, 817 F.2d 144, reinstated en banc and rehearing denied sub nom. <i>Bartlett on behalf of Neuman v. Bowen</i> , 824 F.2d 1240 (D.C. Cir. 1987)	19-23
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986).....	passim
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985)	3, 17-18
<i>Monsanto Co. v. Spray-Rite Service Corp.</i> , 465 U.S. 752 (1984)	22-25
<i>Mt. Healthy City School District Board of Education v. Doyle</i> , 429 U.S. 274 (1977)	28
<i>Ollman v. Toll</i> , 518 F. Supp. 1196 (D. Md. 1981), aff'd per curiam, 704 F.2d 139 (4th Cir. 1983).....	26
<i>Poe v. Haydon</i> , 853 F.2d 418 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989).....	21-22n.14
<i>Poller v. Columbia Broadcasting System</i> , 368 U.S. 464 (1962)	23
<i>Pueblo Neighborhood Health Centers v. Losavio</i> , 847 F.2d 642 (10th Cir. 1988).....	21, 23
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978)	27

	PAGE
<i>Siebert v. Gilley</i> , 895 F.2d 797 (D.C. Cir. 1990), <i>petition for cert. filed</i> , No. 90-96 (July 13, 1990)	21, 25
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)	27
<i>Tribble v. Gardner</i> , 860 F.2d 321 (9th Cir. 1988), <i>cert. denied</i> , 109 S.Ct. 2087 (1989)	21
<i>United States v. Colgate & Co.</i> , 250 U.S. 300 (1919)	23
<i>United States v. Diebold, Inc.</i> , 369 U.S. 654 (1962) (<i>per curiam</i>)	16, 23
<i>University of Pennsylvania v. EEOC</i> , 110 S. Ct. 577 (1990)	27
<i>Whitacre v. Davey</i> , 890 F.2d 1168 (D.C. Cir. 1989), <i>cert. denied</i> , 110 S.Ct. 3301 (1990).	21
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975).	18
<i>Wright v. South Arkansas Regional Health Center, Inc.</i> , 800 F.2d 199 (8th Cir. 1986)	26
 Article	
Collins, "Summary Judgment and Circumstantial Evidence," 40 Stanford L. Rev. 491	25

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Clifton R. Wharton, Jr., formerly Chancellor of the State University of New York ("SUNY"); John H. Marburger, President of SUNY at Stony Brook ("Stony Brook"); Homer A. Neal, formerly Provost at Stony Brook; and Robert C. Neville, formerly Dean of Humanities and Fine Arts at Stony Brook, by their counsel, the Attorney General of the State of New York, respectfully petition for a writ of certiorari to

review the opinion and judgment of the United States Court of Appeals for the Second Circuit.¹

OPINIONS BELOW

The opinion of the court of appeals is reported at 900 F.2d 587 (2d Cir. 1990) and is reproduced in the appendix at 2a. The memorandum decision of the district court is unreported and is reproduced in the appendix at 35a.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 12, 1990. The order of that court denying a timely petition for rehearing was entered on June 15, 1990. (1a). On September 4, 1990, Justice Marshall extended the time for filing this petition to September 27, 1990.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1). *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The constitutional and regulatory provisions involved are the First Amendment to the Constitution of the United States and Rule 56, subsections (b), (c), and (e) of the Federal Rules of Civil Procedure. The texts of these provisions are reproduced in the appendix at 88a.

1 The parties to the proceeding in the court of appeals were respondent Dube, petitioners Wharton, Marburger, Neal, and Neville, and additional defendants SUNY and Jerome B. Komisar, a former acting Chancellor of SUNY. The court of appeals dismissed all claims against SUNY and Komisar. Additional plaintiffs whose claims had already been dismissed by the district court were listed as "respondents" in the official caption of the court of appeals although they never appealed their dismissal. (2a).

STATEMENT OF THE CASE

A. Respondent's Employment At Stony Brook And The 1983 Controversy

Respondent Dube, whose doctoral degree was in the field of cognitive psychology, was appointed assistant professor in Stony Brook's Africana Studies Program commencing September 1, 1977 (Appendix submitted to the Court of Appeals ("A") at 56-57, 284). His employment was governed by an agreement between New York State and the United University Professions ("the UUP"), the collective bargaining agent for Stony Brook professors, as well as the Policies of the SUNY Board of Trustees. (A. 56-57, 256, 522-23, 543-546).

Dube was reappointed for a three-year term commencing September 1, 1980. (A. 59). Subsequently, however, he requested and was granted leave for academic year 1980-81, stating, "I have not been able to be as productive in both research and writing as I had hoped to be." (A. 524). As a result, his tenure review, which had been scheduled for the 1982-83 academic year, was rescheduled for 1983-84.²

Despite his training in psychology, most of the courses Dube chose to teach were in African politics and history.³ (A. 22, 297-304, 590). One of these courses was AFS 319, "The Politics of Race." (A. 301-304). During the summer of 1983, a controversy arose over charges by a visiting professor

2 An appointee holding a position of "academic" rank could not remain at Stony Brook for more than seven years without a "continuing appointment," i.e., tenure. Since an appointee was entitled to one year's notice if he was not to receive such an appointment, tenure review had to be initiated and completed in the sixth year of service unless the appointee took leave or held a "non-academic" rank, such as lecturer, in the interim. (A. 522-23, 525).

3 Dube, a native of South Africa, had been active in the anti-apartheid movement and was expelled from that country after imprisonment for his views. (A. 21, 224-25). Despite the courses he taught, he continued to define himself, academically, as "a cognitive psychologist, not a historian or political scientist" (A. 590), and did not expect additional time to prepare for tenure because he taught courses outside of his academic field. (A. 592).

that Dube had taught in the course that Zionism was a form of racism and comparable to Nazism. (A. 22-23). The Executive Committee of the University Senate, and subsequently the Senate, considered the matter and found that Dube had not crossed "the bounds of academic freedom." (A. 24-25).

During the course of the ensuing controversy, President Marburger received communications from various individuals and groups and addressed both the Stony Brook community's concern that academic freedom be preserved and the concerns of some groups in the outside community that the university was espousing an anti-semitic philosophy. In one of his statements on the subject, Marburger observed that it was:

well-known that one of our professors has drawn heavy criticism by describing Zionism as a type of racism in a course on "The Politics of Race." In urging his students to draw comparisons with other forms of racism, the professor also suggested, as one of a list of titles for term papers, "Zionism is as Racist as Nazism," a juxtaposition that the professor has described as deliberately provocative, as were the other titles on the list.

(A. 619). Marburger then stated that he concurred with the Senate's findings that Dube's conduct was within the traditional bounds of academic freedom, observing that:

Many individuals who concur with this judgment nevertheless disagree strongly with the ideas expressed by the professor and are uneasy about the manner of their presentation. The articulation of such disagreements is accomplished as a matter of course in the various forums of the University, and it is indeed to foster the airing of such issues that we exist as an institution.

Id.

The first portion of this statement was subsequently criticized as implying, by its use of the phrase "and other forms of racism," that Zionism was, in fact, racist. (A. 51-52, 705). Accordingly, Marburger issued a clarification stating, *inter alia*, that, "[t]he Stony Brook administration, for which I speak officially here, absolutely divorces itself from the views

expressed in this course, and from any view that links Zionism with racism or nazism. Furthermore, I personally find such linkages morally abhorrent." (84a). Nevertheless, Marburger continued to defend Dube's freedom to teach AFS 319 as he wished. (A. 54, 862).

Among the communications Marburger received during the course of the public controversy was a letter from a New York Assemblyman, Lewis J. Yevoli, stating that he was:

request[ing] Assemblyman Arthur J. Kremer, Chairman of the Assembly's Ways and Means Committee, to thoroughly review the possibility of removing state funds from the Stony Brook budget proposal for the 1983-84 fiscal year, which would be used for the continuation of the Africana Studies course as it is presently constituted.

Additionally, I have requested Mr. Carl McCall, Commissioner of the State's Division of Human Rights, to determine if any violations have occurred.

(A. 620-21). Commissioner McCall rejected the idea of an "investigation."⁴ (80a).

Similarly, Assemblyman Kremer rejected Yevoli's suggestion of "defunding" AFS 319, informing him that there was "no precedent" for his suggestion, that it had never been the Legislature's policy, and that Kremer himself was opposed to it. (77a, 81a).⁵ Neither Kremer nor Yevoli had any contact with Marburger concerning Dube thereafter and neither was involved in any manner with the tenure decision. (77a-78a, 82a). Marburger also received some letters from alumni, including five letters stating the writers would no longer con-

4 McCall did, however, visit the campus subsequently on a healing mission, under the aegis of the local chapter of the NAACP (80a; A. 836), with Rabbi Israel Mowshowitz, a member of the Governor's staff with whom McCall had previously collaborated on "issues involving what we refer to as black-Jewish relations." (78a-80a; A. 835).

5 Kremer nevertheless sent his own letter to Marburger, prompted by a concern that the President had not adequately expressed his official position. By the time his letter was received, however, Marburger had already issued the October 19, 1983 statement, which Kremer felt to be satisfactory. (83a).

tribute to Stony Brook. (A. 853, 867). Because Stony Brook is a major state-funded university center, however (A. 540-542), contributions from alumni "constitute only a minuscule source of Stony Brook's funding." (A. 853).

Throughout this period there were also communications from and demonstrations by supporters of Dube (A. 858, 861-863). Moreover, Marburger met with not only representatives of Jewish organizations but also groups expressing the concerns of the black community. (A. 52, 54).

In the years following, Dube continued to teach AFS 319 without interference, offering it in several of the succeeding semesters. (87a; A. 303-304). Nevertheless, he requested that his tenure review be postponed a second time, citing "a need for some time to allow the tempers to cool." (A. 526). President Marburger acceded, rescheduling tenure review for 1984-85. (A. 531). As a result of these postponements, Dube had approximately seven years, in contrast to the usual five, in which to publish.

B. The Review Of Respondent's Candidacy For Tenure And Promotion

Pursuant to guidelines established by the Personnel Policy Committee for the College of Arts and Sciences, petitioner Neville, Dean of Humanities and Fine Arts, appointed an *ad hoc* review committee, consisting of the two tenured faculty members in the Africana Studies Program and five tenured faculty from various Stony Brook departments, to compile Dube's file and consider his candidacy for tenure. (A. 214, 222). The AFS Director served as Chair and participated in the committee appointments. (A. 221; 48a).

The information Dube supplied demonstrated that although he had prepared numerous papers relating to his interests in African politics, he had published only two items, an excerpt from his dissertation in *Memory Observed* (a collection of essays published by his adviser at Cornell, Ulric Neisser) and a political piece in a non-refereed journal.⁶ (74a;

6 As noted by petitioner Marburger, "[a] non-refereed article is entitled to less weight than an article, published in a refereed journal, which has

A. 291-94). A third item had been accepted for publication in a refereed journal. (A. 286). Dube described his pending research as "what may turn out to be first a paper and later a book on 'The Mystification of Education.'" (A. 295). No portion of this work was submitted for publication while Dube was at Stony Brook. (A. 593).⁷

Dube's file also contained evaluative letters from his own references, other outside scholars and interested colleagues. Several acknowledged weaknesses in Dube's scholarly record. For example, Neisser's letter stated that Dube's doctoral thesis "is the only piece of cognitive research Dube has ever done. He did not even prepare the selection for *[M]emory Observed*: I did that with his permission." (75a). Neisser also wrote that he consequently could not "reasonably assess" Dube's "'professional achievements and standing in the fields of Africana Studies/Psychology.'" There are certainly black cognitive psychologists in America who could be described as being in that field—good ones—but it would make no sense to compare them with Dube." (75a). Others, writing in support of Dube's candidacy, conceded that "[t]he fact that [Dube] has published so little [in the years subsequent to his dissertation] must make the tenure decision very difficult for you and there is little I can do to help you with that decision" (A. 408), that Dube had "a less than impressive publication record" (A. 433), and that Dube's "record of publications could be stronger than it is" (A. 412).

Similarly, the *ad hoc* committee's report acknowledged "that much of Professor Dube's expertise . . . has not been written down," that "[h]e does not easily fit the 'mold' of the 'traditional' academic," and that consideration of his "life experiences" was necessary to obtain a "rounded assessment of his accomplishments." (48a-49a). Nevertheless, the

undergone scholarly scrutiny and met certain standards prior to publication." (A. 520).

7 Nor had it been published as of the date of his July 1987 deposition. Although Dube testified that he hoped to submit a manuscript to a publisher within the next two months (86a), he provided only a 40-page handwritten synopsis when he was asked to produce it. (A. 102-103, 116-154).

committee, relying on his other qualities, voted 6-1 in favor of granting Dube tenure. Only four members favored his promotion to associate professor. (A. 215).

The Personnel Policy Committee ("the PPC"), a standing committee elected by the faculty of the College of Arts and Sciences, recommended tenure by a vote of 4 to 3, but voted unanimously against promotion. (A. 215). In a memorandum to Neville summarizing the deliberations, the chair stated that "[t]here was general agreement that both the quantity and quality of written scholarship was short of the usual standards," and that for three members "the usual standards for written scholarship would be too severely compromised to recommend tenure." (52a-53a). The differences of opinion among the members concerned "the weights that should be assigned to the various criteria." (53a).

Neville deliberated on these memoranda and ultimately recommended that Dube be given neither tenure nor promotion. (A. 215-216). In his memorandum to the Provost, petitioner Neal, he noted that Dube's three publications were less numerous than generally required for tenure at Stony Brook and lacked "the mature development of an intellectual project which we look for in granting faculty tenure." (56a). He also observed that he "kn[e]w for a fact that his chairmen have encouraged him repeatedly to produce such a work." (58a). Neisser's observation that Dube had not prepared the selection in *Memory Observed* suggested to Neville that Dube had simply "lost interest in the project." (55a). Neville also believed that for Africana Studies to become a department and develop a graduate program it would have to "elaborate its relations with other departments," and that "Professor Dube's apparent withdrawal from academic psychology" would not help. (59a).

Neal, who reviewed Neville's recommendation and received negative recommendations from two members of his Provostial Council, also recommended against both tenure and promotion. (A. 503-504, 506-507). In a memorandum to the President, he stated that "[c]ontinuing appointment at a major research university is warranted only when an individual has taken his or her unique experiences, training, back-

ground and insights and prodigiously translated them into a form, based on the rigors of scholarly traditions, that can be read and shared by scholars for generations to come," and that "[a]s pointed out by Dean Neville, Dr. Dube's publication record is extremely limited." (61a-62a). Neal also noted that the PPC's recommendation of tenure without promotion was "in exception to standard practice." (61a).

Based on these materials, and his own deliberations, President Marburger declined to recommend Dube to Chancellor Wharton for promotion or tenure. (A. 533-34). Marburger noted the deficiencies in Dube's scholarly record and stated that the recommendations of the Provost and Dean departed from the faculty committees only because Neville and Neal properly assigned greater weight to scholarship. (64a-65a).

Dube sought review by Chancellor Wharton pursuant to Article 33 of the agreement between the State and the UUP. (A. 558). Article 33 provided for a preliminary review and recommendation to the Chancellor by a campus-based advisory committee. (A. 543-46, 558).⁸ This committee, like the PPC, recommended tenure without promotion. (A. 567). Before the Chancellor had an opportunity to consider the recommendation, however, the committee's report was disclosed to the press and the American Association of University Professors ("the AAUP"), and the AAUP's Secretary wrote to Wharton urging him to accept it. (A. 552-53, 569, 575-76). Because the AAUP also serves as a collective bargaining agent for university professors, Wharton viewed its actions as an encroachment upon the role reserved to the UUP and advised the Secretary that the premature disclosure breached negotiated procedure and principles of confidentiality inherent to tenure review. (A. 552-53, 570). Wharton then appointed a second advisory committee. In the interim, he extended Dube's appointment through February 28, 1987. (A. 573-574).

The members of this second committee acknowledged that "[s]ince the completion of his thesis at Cornell Unive[r]sity,

⁸ The President and the candidate each selected one member. These nominees then selected the third member. (A. 544-45, 552).

Professor Dube's publication record has been below the levels normally considered adequate for promotion and tenure at SUNY/Stony Brook." (67a-68a). Reasoning that the controversy had affected Dube's productivity, however, they recommended that the Chancellor grant Dube either tenure without promotion or an additional three-year term, with promotion and tenure to be considered in 1989-1990. (70a). In reaching these conclusions, the committee explicitly observed that the varying opinions among those who had evaluated Dube's candidacy were "due to the difference in weight given to Professor Dube's scholarship, teaching, and service record." (69a).

On January 30, 1987, the Chancellor announced that he had decided not to grant Dube tenure at Stony Brook. (71a-73a). He noted that scholarship is weighted more heavily at a graduate, research university center⁹ than at undergraduate schools, and that the Dean, Provost, and President properly found Dube's record to be deficient by Stony Brook standards. (71a).

The Chancellor expressed concern, however, that Dube might be "penalized professionally for inaccurate perceptions of [the] adverse decision." (72a). He predicted that:

extraneous issues—irrelevant to the tenure decision *per se*—will be used both by your critics and defenders to interpret whatever tenure decision is made. If an adverse tenure decision is made, your critics will claim that it is a vindication of their charge of impropriety in your teaching and your advocates will claim that the decision was based upon racial/religious biases. If a positive tenure decision is made, your critics will claim that it represents a reaffirmation of the content of your teaching and your advocates will claim a victory against racial/religious bigotry and for the content of your teaching. In neither case will the true bases of the decision be seen

9 Stony Brook was one of only four such university centers within the multi-campus SUNY system and the only SUNY campus classified as a "Research I" facility in a compilation by the Carnegie Foundation. (A. 518, 540-42).

as the traditional ones, that is, the quality of your performance in teaching, research and public service.

(72a). Because Wharton believed that SUNY had "a responsibility to provide reasonable protection to our faculty from external excesses which could do damage to their careers," he offered to provide funding for an appointment (possibly with tenure) at another SUNY campus, if such a campus "after appropriate faculty/departmental review of credentials and personal interviews" agreed to Dube's appointment. (72a-73a). Although Wharton again extended Dube's appointment, through August 31, 1987 (73a), Dube did not pursue the offer.

C. The Proceedings Below

Respondent Dube and other plaintiffs initiated this action on May 19, 1987 and sought a preliminary injunction staying the expiration of Dube's extended term of employment. (A. 7-39). The complaint, brought pursuant to 42 U.S.C. § 1983 and principles of pendent jurisdiction, sought a permanent injunction against the termination of Dube's employment, the award of tenure at Stony Brook, compensatory damages for any period in which he was not employed during this action, and \$100,000 in punitive damages from each of the petitioners and defendant Komisar. (A. 19, 38-39).

The first cause of action alleged that all of the defendants violated Dube's first amendment rights. (A. 21-37). The second cause of action alleged that Wharton violated his fourteenth amendment right to due process of law. (A. 37). The third cause of action asserted that Wharton violated the agreement with the UUP. (A. 38). The fourth cause of action alleged state law claims against the defendants under unspecified sections of the New York Constitution and Civil Service Law and the SUNY Policies. (A. 38).

The district court denied Dube's application for a preliminary injunction and dismissed all other plaintiffs for lack of standing. (A. 2). The remaining parties then proceeded to take discovery. Counsel for Dube deposed all five individual defendants and eight non-party witnesses. Counsel for the

defendants deposed Dube, three former plaintiffs and a former faculty member. Both sides produced documents and responded to other discovery requests.

On October 1, 1987, all of the defendants filed a motion for judgment on the pleadings or summary judgment with respect to all of Dube's claims for relief and petitioners' and Komisar's entitlement to qualified immunity from liability in damages. (A. 88-89). Each of the petitioners submitted an affidavit in support of the motion, setting forth the basis for his own recommendation or decision. (A. 213-19, 502-505, 514-21, 551-57). Neville stated, *inter alia*, that he ascribed particular significance to (i) the split vote on tenure in the PPC, (ii) its failure to recommend promotion, (iii) its acknowledgment as to the weaknesses in Dube's scholarly record, (iv) the split votes in the *ad hoc* committee, and (v) the ambivalent tone of the Neisser letter. (A. 215-216).

Like Neville, Neal was struck by the PPC's split vote on tenure and its failure to recommend promotion with tenure, a departure from University norms. (A. 504, 509-513). Similarly, Marburger cited the split votes, the Neisser letter, and recurrent references in other letters to the excerpt in *Memory Observed* which underscored that the dissertation was the only piece of cognitive research Dube had completed. (A. 517). Wharton noted deficiencies in Dube's scholarly record and a policy of permitting a President "to exercise his judgment with regard to the proper weight to be placed upon scholarly achievement at a graduate/research university center." (A. 555-557). Each of the petitioners stated unequivocally that the controversy was not a factor in his conclusion. (A. 219, 505, 521, 557).¹⁰

10 Petitioners also submitted data, developed through discovery requests by respondent, establishing that: (i) Marburger had rejected departmental-level recommendations for tenure on numerous occasions, including six in 1984-85 alone; he had also rejected a standing committee recommendation for tenure on five occasions between 1980 and 1986 (A. 854-55, 878-889); and (ii) Wharton had decided fifty-seven Article 33 appeals and rejected the advisory committee recommendation in twenty-five; nine of the twenty-five recommendations he rejected were, like Dube's, unanimously in favor of tenure. (A. 81-87).

In response to the motion, respondent filed a statement, pursuant to Rule 3(g) of the rules of the district court, in which he attempted to set forth material facts he believed were genuinely disputed. It recounted, *inter alia*:

(i) that the University "repudiated" Dube as a result of "a publicity and lobbying campaign directed at President Marburger" by the B'nai Brith Anti Defamation League of Long Island ("the ADL") and the American Jewish Committee (the "AJC") (A. 610);

(ii) that the 1985-87 tenure review process was "adversely impacted" by letters from alumni (A. 610);

(iii) that the 1985-87 tenure review process was "adversely impacted" by a 1983 visit to the campus from Carl McCall, then the State Commissioner of Human Rights, and that McCall's visit was prompted by Assemblyman Yevoli's letter to Marburger threatening to take steps to block funding for Africana Studies (A. 610-611);

(iv) that the 1985-87 tenure review process was "adversely impacted" by the 1983 letter to Marburger from Kremer which respondent claimed was in response to the Yevoli letter (A. 611); and

(v) that the 1985-87 tenure review process was "impacted" by an August 31, 1983 statement by Governor Cuomo (A. 611).

The only statements as to the motives of petitioners Neville and Neal were conclusory allegations that their recommendations were "influenced" by the controversy. (A. 613).

Respondent, who relied entirely on documents and deposition testimony in responding to the motion, failed to cite or annex to his papers either the alumni letters themselves or any evidence about them.

With regard to respondent's "repudiation" allegation, the items of evidence presented were (a) Marburger's October 19, 1983 Statement (84a-85a); (b) a September 16, 1983 Statement by the ADL (A. 704-705) concerning the prior statement by Marburger (A. 619); and (c) a fragment of deposition testimony by Marburger reflecting his concern that

the ADL believed that he himself had linked Zionism with racism. (A. 725). Respondent's evidence of the alleged publicity and lobbying campaign by the AJC and ADL consisted of i) deposition testimony by Rabbi Arthur Seltzer, Long Island Regional Director of the ADL, primarily relating to the recommendation by a Stony Brook faculty committee to establish University procedures for reviewing charges of academic misconduct (A. 763d-763f, 763h, 846); (ii) evidence that the AJC and the ADL nominated candidates to the Stony Brook Regional Relations Advisory Council (A. 684-687, 763c, 775-778); and iii) an August 5, 1985 letter from Seltzer to Marburger complaining of the "inflammatory" nature of an article by Dube (A. 688-693, 779-784).

As to the allegation that the Cuomo statement had an "impact," the only evidence cited was an item in a draft chronology indicating that Cuomo had "criticize[d] the faculty . . . at Stony Brook for not openly disagreeing with 'the content' of Professor Dube's teachings" and "declare[d] that 'the silence at Stony Brook is thunderous.' " (A. 794).

In addition, respondent cited to various items of evidence which he felt supported his claims against Wharton, including Wharton's January 30, 1987 letter, informing Dube of the ultimate decision.

D. The District Court's Decision

In a memorandum decision dated October 14, 1988, the district court denied the motion by petitioners and the additional defendants insofar as they sought (i) summary judgment as to respondent's first amendment claim; (ii) judgment on the pleadings or summary judgment as to the fourteenth amendment due process claim; (iii) summary judgment on petitioners' and defendant Komisar's claims of qualified immunity from liability in damages as to the first and fourteenth amendment claims; and (iv) judgment on the pleadings as to respondent's equitable claims against SUNY and his state law claims. (43a-46a). The court granted the motion for judgment on the pleadings insofar as respondent sought dam-

ages from SUNY or from Komisar and the petitioners in their official capacities.

Although the Court conceded that Dube's exercise of his free speech rights and the denial of tenure "appear to be distant both in time and subject matter" (46a), it opined that summary judgment was inappropriate where state of mind is implicated, especially in civil rights cases. (43a-44a). With regard to qualified immunity, the Court stated only that Komisar's and petitioners' "good faith belief of reasonable university officials that the denial of tenure was 'based on Dr. Dube's file and the standards applicable at Stony Brook and in light of clearly established law' . . . is not an answer to Dube's claim." (45a). The court further stated that Dube "neither claims that the denial of tenure violated his constitutional rights nor that the denial of tenure was in retaliation for the exercise of his First Amendment rights." (45a). Rather, the court understood Dube's theory of liability to be "that the university, through its President and Chancellor, permitted community outrage over the exercise of [Dube's] First Amendment rights to deny him tenure." (45a). The Court did not indicate how this theory related to claims against petitioners Neville or Neal.

E. The Court Of Appeals' Decision

The court of appeals modified the district court's decision insofar as it failed to dismiss all claims against SUNY and Komisar and the due process claim against Wharton. (31a-32a). With respect to respondent's first amendment claim, however, the court affirmed the denial of summary judgment, both on the merits and as to qualified immunity.¹¹ (32a).

Although petitioners asserted that a standard more demanding of plaintiffs should apply when public officer defendants move for summary judgment as to qualified

11 Judge Meskill, writing for the Court, found the district court's discussion of qualified immunity enigmatic and concluded that the district judge had not adequately considered that subject. (22a-23a). Judge Miner, who concurred in the decision, disagreed as to this conclusion. (32a-33a).

immunity and their state of mind is an essential element of the underlying claim, the court of appeals discussed neither the appropriateness of a heightened standard nor the authorities petitioners cited applying one.

Moreover, although the court of appeals acknowledged authorities establishing "that courts should accord deference to academic decisions," it did not find such deference appropriate on the record before it. (27a). The court reasoned that "under Fed. R. Civ. P. 56, 'factual allegations in the pleadings of the party opposing the motion for summary judgment, if supported by affidavits or other evidentiary material, should be regarded as true by the district court,' " and that all " 'inferences to be drawn from the [underlying] facts contained in the affidavits, attached exhibits, and depositions submitted below . . . must be viewed in the light most favorable to the party opposing the motion' " (quoting *United States v. Diebold, Inc.*, 369 U.S. 654 (1962) (*per curiam*)). (24a). In the court's view, Dube had "proffered evidence from which a jury could find that defendants denied tenure and promotion to him in response to pressure exerted by government officials and community activists outraged by his teachings." (25a). Since it is "clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation 'that cast a pall of orthodoxy' over the free exchange of ideas in the classroom," the court concluded that "assuming the defendants retaliated against Dube based on the content of his classroom discourse, such conduct was, as a matter of law, objectively unreasonable. . . . Accordingly, the defendants are *not* qualifiedly immune from section 1983 liability on Dube's First Amendment claim." (27a).

Judge Mahoney, "generally concurring," disagreed with the majority's conclusion that "the defense of qualified immunity is removed from the case" believing that petitioners should be permitted to assert qualified immunity at trial. (33a-34a).

REASONS FOR GRANTING THE PETITION

A. The Decision Of The Second Circuit Conflicts With The Decisions Of Other Courts Of Appeals Imposing A Heightened Standard On Plaintiffs Alleging Motive-Based Claims Where Public Official Defendants Seek Summary Judgment As To Qualified Immunity.

This petition presents the Court with an opportunity to address what evidentiary standard a plaintiff must meet when a public official defendant moves for summary judgment as to qualified immunity in the context of a claim which turns upon the intent of the actor. Although the Court has addressed the doctrine of qualified immunity at some length in recent years, adopting a test of objective reasonableness in *Harlow v. Fitzgerald*, 457 U.S. 800, 817-819 (1982), describing the junctures at which the defense may be asserted in *Mitchell v. Forsyth*, 472 U.S. 511, 524-530 (1985), and addressing the level of particularization at which the availability of the defense must be determined in *Malley v. Briggs*, 475 U.S. 335, 341-346 (1986) and *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987), it has yet to discuss the precise question presented here. Its resolution is important because, as Justice Scalia observed, writing for the District of Columbia circuit, in *Halperin v. Kissinger*, 807 F.2d 180, 186 (D.C. Cir. 1986), "the 'objectification' of the qualified immunity defense, and the consequent early elimination of unsubstantial claims, which was the announced purpose of *Harlow*, has simply not been achieved (not even *nearly* achieved)"

In *Harlow*, which alleged a conspiracy to violate the plaintiff's first amendment rights, the Court held that government officials sued under the Constitution or 42 U.S.C. § 1983 "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. See also *Malley v. Briggs*, 475 U.S. at 341; *Mitchell v. Forsyth*, 472 U.S. at 524.

Before *Harlow*, qualified immunity was unavailable if an official "took the action *with the malicious intention* to

cause a deprivation of constitutional rights or other injury’ [*Wood v. Strickland*, 420 U.S. 308, 322 (1975)] (emphasis added).” *Harlow*, 457 U.S. at 815. Because this element of the *Wood v. Strickland* “good faith” test had frequently resulted in disputed issues of fact precluding summary judgment, the Court expressly overruled *Wood*, rendering the issue of an official’s subjective bad faith irrelevant to a determination of his entitlement to qualified immunity. *Harlow*, 457 U.S. at 817-818. As the Court subsequently noted in *Anderson v. Creighton*, 483 U.S. at 638, “permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.”

By “defining the limits of qualified immunity essentially in objective terms,” *Harlow*, 457 U.S. at 819, the Court sought to reduce these costs and increase the likelihood that a court could dispose of a claim on a motion for summary judgment, *id.* at 816-818. See also *Mitchell v. Forsyth*, 472 U.S. at 525-526. Determining the availability of the defense prior to trial is essential to this purpose because “[t]he entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v. Forsyth*, 472 U.S. at 526. Thus, “[e]ven if the plaintiff’s complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.” *Id.*

Although this Court has elaborated, in cases subsequent to *Harlow* and *Mitchell*, upon the role of malice in the qualified immunity doctrine, it has not addressed that subject in the context of an action where malice was a necessary element of the constitutional violation alleged.¹² See *Anderson v.*

¹² As noted above, *Harlow* itself involved a claim which turned in part on the intent of the actors. In *Harlow*, however, the threshold question was

Creighton, 483 U.S. at 641 (“[t]he relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson’s warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson’s subjective beliefs about the search are irrelevant.”); *Malley v. Briggs*, 475 U.S. at 341 (allegation of malice insufficient to defeat immunity where probable cause for an arrest was at issue).

In *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, *partially vacated en banc and rehearing granted*, 817 F.2d 144, *reinstated en banc and rehearing denied sub nom. Bartlett on Behalf of Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987), however, the Court of Appeals for the District of Columbia Circuit addressed the question left unanswered in the decisions discussed above: how best to reconcile the “tug in opposite directions” posed by “[t]he ‘clearly established law’ and ‘objective reasonableness’ facets of current qualified immunity doctrine . . . where, as here, the ‘clearly established law’ itself contains a subjective component.” 812 F.2d at 1432. Plaintiff Martin alleged that he had been arrested and prosecuted to deter him from pursuing civil claims arising out of an incident during a Ku Klux Klan march in which he was filmed by the news media being pushed through a window and beaten by police. *Id.* at 1427, 1431.

The court commenced its analysis by noting that “[i]f *Harlow* and progeny do not ever permit inquiry into a government official’s state of mind, defendants’ motion must be granted forthwith, for in Martin’s case, absent unconstitutional motive for the plaintiff’s arrest and prosecution, no clearly established law has been violated.” *Id.* at 1432.

whether the applicable legal principles upon which plaintiff sought to rely were clearly established at the time of the acts alleged. Since the trial court had not had an opportunity to consider this question in the light of the new, objective standard, the court remanded without deciding whether the quantum and quality of the evidence adduced by plaintiff would have been sufficient to substantiate the claim. 457 U.S. at 819-820.

Although the court ultimately concluded that "the *Harlow* decisional line [did not reach] that far," (*id.*), it nevertheless was concerned that "[w]hile we hold that plaintiffs may present claims that depend upon proof of unconstitutional motive, we . . . take care not to reimpose 'precisely the burden *Harlow* sought to prevent.' *Hobson v. Wilson*, 737 F.2d [1,] at 29 [(D.C. Cir. 1984), *cert. denied sub nom. Brennan v. Hobson*, 470 U.S. 1084 (1985)]." 812 F.2d at 1435. Accordingly, the court considered other means of effectuating the policy interests underlying the qualified immunity doctrine. *Id.* at 1433.

The court concluded that "[t]he Supreme Court's 'strong condemnation of insubstantial suits against government officials,' *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984), impels the application of a standard more demanding of plaintiffs when public officer defendants move for summary judgment on the basis of their qualified immunity."¹³ 812 F.2d at 1435. It further held that Martin's showing was insufficient, even though "in an ordinary case . . . , circumstantial evidence of this quality might allow a plaintiff to remain in court." *Id.*

Adopting a heightened standard, in the *Martin* court's view, struck the appropriate balance "between 1) the 'need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority,' *Butz v. Economou*, 438 U.S. [478,] at 506 [(1978)], . . . and 2) the countervailing need to provide a 'realistic avenue for vindication of constitutional

13 The precise test adopted in *Martin* was as follows:

Where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated must be produced if the case is to proceed to trial.

812 F.2d at 1435. See also *Harris v. Eichbaum*, 642 F. Supp. 1056, 1066 (D. Md. 1986) (cited in *Martin*). A "direct evidence" test, however, is only one means of making the standard more demanding. See discussion *infra*.

guarantees.' *Harlow*, 457 U.S. at 814" 812 F.2d at 1433. The court of appeals for the District of Columbia circuit has since extended its formulation of a heightened standard to equal protection and liberty interest claims under the fifth amendment. See *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 3301 (1990); *Siebert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *petition for cert. filed*, No. 90-96 (July 13, 1990).

The tenth circuit, citing *Martin*, but reformulating the applicable test, has similarly determined to apply "'a standard more demanding of plaintiffs'" when public officials seek summary judgment as to the issue of qualified immunity and motive is at issue. *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988). The ninth circuit has also acknowledged the *Martin* test and the "responsibility not to reimpose the burden upon government officials *Harlow* sought to prevent." *Tribble v. Gardner*, 860 F.2d 321, 327 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 2087 (1989). Although that court declined to apply the test to a claim that a correctional facility's cavity-search policy was unconstitutional, its reasoning related to the specific nature of the claim:

we are not concerned with the defendants' subjective malice in conducting the particular search upon Tribble; rather, Tribble asks us to examine the purpose of the policy requiring such searches. . . . In cases where the purpose of a prison regulation is at issue, there is no 'direct evidence' equivalent to legislative history that plaintiffs may examine.

Id. See also *Collinson v. Gott*, 895 F.2d 994, 1002 (4th Cir. 1990) (holding unclear) (agreeing that a standard more demanding of plaintiffs would be justified, but questioning whether the test articulated in *Pueblo* does, in fact, impose one).¹⁴

¹⁴ There appears to be a split within the sixth circuit as to the proper test to be applied. In *Poe v. Haydon*, 853 F.2d 418, 432 (6th Cir. 1988), *cert. denied* 488 U.S. 1007 (1989), a panel of that circuit adopted the identical test

As the discussion below establishes, an appropriate model for a heightened standard has already been developed by this Court in the context of antitrust claims. Indeed, in reaching its conclusion to impose a greater burden on plaintiff Martin, the court of appeals for the District of Columbia circuit explicitly relied on these prior decisions of this Court:

Limitations of this kind on the range of inferences a trial court may draw are not extraordinary. Where an antitrust conspiracy is alleged, for example, "mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, [475] U.S. [574, 594], 106 S. Ct. 1348, 1360, 89 L.Ed.2d 538 (1986); see also *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-64, 104 S.Ct. 1464, 1470-71, 79 L.Ed.2d 775 (1984). Therefore, to survive a motion for summary judgment, a plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 106 S.Ct. at 1357, quoting *Monsanto*, 465 U.S. at 764, 104 S.Ct. at 1471; cf. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 280-90, 88 S.Ct. 1575, 1588-93, 20 L.Ed.2d 569 (1968) (circumstantial evidence of conspiracy insufficient to take the case to the jury where inference of nonconspiratorial conduct equally plausible);

812 F.2d at 1435-36.

articulated in *Martin*, which bars exclusive reliance on inferential and circumstantial proof. A different panel subsequently held, however, that *Poe* did *not* preclude reliance on inferential and circumstantial proof or "set a higher standard for qualified immunity than applies on the merits," *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989). The position of the first circuit is similarly unclear. Compare *Krohn v. United States*, 742 F.2d at 31 (plaintiff seeking to avoid a defendant official's motion for summary judgment pursuant to Rule 56(f) will face "a much higher burden than is borne by the plaintiff who opposes an ordinary summary judgment motion"), with *Feliciano-Angulo v. Rivera-Cruz*, 858 F.2d 40, 47 (1st Cir. 1988) (citing *Martin*, but holding that plaintiff's claims were not "so unsupported or implausible on their face as to warrant dismissing them" before discovery).

In *Monsanto* and *Matsushita* the Court was concerned that “[i]f an inference of [a concerted price-fixing agreement] may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in [*Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)] and [*United States v. Colgate & Co.*, 250 U.S. 300 (1919)] will be seriously eroded.” 465 U.S. at 763. For this reason the Court required plaintiffs to adduce evidence tending to exclude the explanations offered by the defendants. *Id.* at 764. Similarly, in *Martin*, the District of Columbia circuit was concerned that the efficacy of the test articulated in *Harlow* would be seriously eroded, as to motive-based claims, if plaintiffs were permitted to reach a jury solely on the basis of ambiguous evidence. Application of principles akin to the rules which apply to antitrust cases is an appropriate response to the “conflicting concerns” to which this Court alluded in *Anderson v. Creighton*, 483 U.S. at 638—the need to provide an effective vehicle for the vindication of individuals’ constitutional rights versus the desire to encourage independent decision-making by government officials performing discretionary functions.

It is clear from the second circuit’s decision in this case that that court did not apply *Martin*’s direct evidence test or any other type of heightened standard to respondent’s showing, or in any way limit the inferences respondent sought to draw. Although petitioners cited both *Martin* and *Pueblo*, neither was discussed by the Court. Moreover, it is clear from the authorities the court did cite, including, *e.g.*, *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (*per curiam*), and *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), that it required only that respondent adduce evidence which, when taken as true, would entitle a jury to conclude that he had met the traditional preponderance burden.¹⁵ Accordingly, there is now a split among the circuits concerning what standard should be applied when public officials move for summary judgment as to their enti-

¹⁵ Petitioners nevertheless submit that respondent failed to meet even this lighter burden.

tlement to qualified immunity concerning motive-based claims. The petition should be granted in order to resolve this conflict.

B. The Decision Of The Court Of Appeals Should Be Reversed Under The Standards Governing Summary Judgment Announced By This Court In *Matsushita*.

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), which involved a conspiracy claim brought under section one of the Sherman Act, this Court noted, citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984) and *First National Bank v. Cities Service Co.*, 391 U.S. 253, 280 (1968), that it had previously held that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." 475 U.S. at 588. The court then elaborated, noting that

conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. . . . To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.

Id. Since the evidence adduced to support improper motive in *Matsushita* was "consistent with other, equally plausible explanations," the court held that "the conduct does not give rise to an inference of conspiracy." *Id.* at 596-597.

In explaining its reasons for applying a special rule in the antitrust context, the court reiterated the concern expressed in *Monsanto* that the effect of permitting an inference of conspiracy from ambiguous evidence "is often to deter procompetitive conduct." 475 U.S. at 593-594. *Matsushita*'s rule concerning equally plausible inferences is thus designed to avoid discouraging desirable conduct on the part of people or entities in the same position as the defendants. Without proscribing a plaintiff's exclusive reliance on circumstantial or inferential evidence, the rule ensures that the use of such evi-

dence will not undermine important goals of the underlying substantive law. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 439 (9th Cir. 1990); *Gibson v. Greater Park City Co.*, 818 F.2d 722, 724-25 (10th Cir. 1987) (applying *Matsushita* test to conspiracy claims arising under civil rights and antitrust laws). See also Collins, "Summary Judgment and Circumstantial Evidence," 40 Stanford L. Rev. 491, 509-511.

The factors leading the Court to apply the *Monsanto* exclusion principle in *Matsushita* also justify a heightened standard where qualified immunity is at stake and where plaintiff's claim is that otherwise legal conduct was undertaken with an illegal motive. Mistaken inferences as to governmental officials will be costly because they will chill conduct the Court seeks to protect: conscientious, uninhibited decision-making by individuals charged with exercising discretionary authority. They will also chill speech, since officials may well fear that their own views may ultimately be used against them. See *Collinson v. Gott*, 895 F.2d 994, 1010 (4th Cir. 1990) (Wilkinson, J. concurring).

Potential liability under section 1983 with respect to employment claims is particularly problematic because government officials who supervise employees make decisions affecting employment on a virtually constant basis. Once a government employee has exercised his right to free speech in a public and controversial manner, for example, he is in a position to "append a claim of unconstitutional motive," *Siebert v. Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), to any subsequent decision as to salary, working conditions, promotion, or continued employment. The supervisor is thereby exposed to individual liability, including, potentially, punitive damages. Though he may ultimately prevail in any lawsuit, the costs to the agency, and thus to the public, of the diversion of his time to discovery and a trial may be substantial. His ability to make unpopular decisions in the future may also be impeded.

These problems are even more pronounced in the academic setting. As petitioner Marburger noted, providing a forum for provocative and unorthodox views is one of the purposes

of a university. Controversial positions are likely to be expressed openly and often in the "robust exchange of ideas" which characterizes the university classroom. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Cf. *Wright v. South Arkansas Regional Health Center, Inc.*, 800 F.2d 199, 204 (8th Cir. 1986) (noting prevalence of "political name-calling" in government). Moreover, tenure itself—involving a choice, pursuant to a pre-ordained schedule, between terminating the candidate or granting him a lifetime appointment—is a somewhat unique phenomenon. Satisfactory performance may be insufficient at a university which requires academic excellence. Under these circumstances, the well-timed disclosure of a candidate's controversial views, whether fortuitous or deliberate, could readily provide the basis for an argument of improper motive.

Under the standard now applied by the second circuit, these arguments cannot be resolved without a trial. If a test similar to the *Matsushita* standard were applied, however, summary judgment could be used to eliminate claims resting on ambiguous evidence, which divert resources and threaten to chill independent decision-making. See e.g., *Ollman v. Toll*, 518 F. Supp. 1196 (D. Md. 1981), *aff'd per curiam*, 704 F.2d 139 (4th Cir. 1983) (Marxist professor failed to adduce evidence excluding defendants' explanation and lost after lengthy trial). Compare *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979) (Marxist professor rebutted proffered explanations and prevailed as to reappointment claim).

The traditional deference this Court has accorded academic institutions also supports application of a heightened standard.¹⁶ As Justice Powell noted, in the context of a discrimination claim:

With respect to laws that prevent discrimination, much depends upon the standards by which the courts examine private decisions that are an exercise of the right of association. For example, the Courts of Appeals generally have acknowledged that respect for academic

¹⁶ Although the court below purported to recognize a principle of academic deference, it clearly played no part in the panel's deliberations.

freedom requires some deference to the judgment of schools and universities as to the qualifications of professors, particularly those considered for tenured positions.”

Hishon v. King & Spaulding, 467 U.S. 69, 80 n.4 (1984) (Powell, J., concurring). Similarly, in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978), the Court stressed that “[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment,” and reiterated Judge Frankfurter’s observation in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) that “who may teach” is one of the “‘four essential freedoms’ that constitute academic freedom.” *University of Pennsylvania v. EEOC*, 110 S. Ct. 577, 586-87 (1990) left open the degree of deference required in tenure cases.

Proper application of the principles articulated in *Matsushita* would have resulted in summary judgment for petitioners. The particular evidence to which the court of appeals alluded in reaching its decision underscores the problems with respondent’s proof. The court failed to identify any evidence concerning petitioners Neville and Neal. Even as to Marburger and Wharton, moreover, the only evidence to which the court referred consisted of:

the Marburger statement, dated October 19, 1983, which “absolutely divorce[d]” the Stony Brook administration from the views expressed by Dube in AFS/POL 319, and Wharton’s letter to Dube, dated January 30, 1987, which certainly established that the controversy concerning Dube’s teaching about Zionism was on Wharton’s mind during his decision-making process.

(25a). The Court further noted “the context of the public protests and threats to defund Stony Brook programs.” *Id.*¹⁷

17 The court did not address the fact that some of the “public protests” were intended to *support* Dube. (A. 862-63).

The statements in the two documents to which the court cited were equally consistent with the inference that Dube was *not* denied tenure as a result of the controversy. Tenure review was pre-ordained; it did not come up as a result of the controversy. Moreover, Marburger's tenure recommendation was made a full two years after the controversy occurred. The fact that Marburger had "divorced" the administration from the view that "Zionism is racism" in 1983 did not stop him from repeatedly extending Dube's contract at Stony Brook, declining to interfere in any way with his continued teaching of AFS 319, and promoting Amiri Baraka, a renowned author and sometime critic of Zionism (A. 863) to full professor (A. 60) during the three and one-half years following the controversy and preceding the final tenure decision. Moreover, it does not constitute evidence as to the frame of mind of any of the remaining petitioners, *i.e.*, Neville, Neal, and Wharton.

Similarly, the purported showing that the controversy "was on Wharton's mind" was neither sufficient to establish a violation of Dube's constitutional rights by Wharton himself, nor probative of the motives of Neville, Neal, and Marburger. Wharton would have violated Dube's rights only if the controversy had been a substantial or motivating factor in his decision to deny tenure to Dube at Stony Brook. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). Although Wharton stated, in his letter to Dube, that a decision granting tenure would have been controversial, he stated simultaneously (and presciently) that the decision denying tenure would be *equally* controversial and that neither Dube's supporters nor his detractors would recognize that the decision had, in fact, been made on the merits. Further, he described the basis for his decision on the merits at some length.

The court below was not at liberty to simply disbelieve Wharton's explanation for his actions. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-257 (1986). Nor could respondent rely on Wharton's observation that the controversy did *not* affect his decision as to tenure at Stony Brook (though motivating his decision to offer help) as evidence that the

opposite was true. *Id.* To the extent that it was plausible to infer from the Chancellor's letter that he experienced "pressure" to deny tenure, it was at least equally plausible to infer that he experienced offsetting pressure to grant it.¹⁸ As noted in *Matsushita*, where competing inferences are equally plausible, the plaintiff cannot prevail. 475 U.S. at 597 n. 21.

Nor would consideration of the supposed "threat" to Stony Brook funding be sufficient to meet respondent's burden when the competing inference that it had no effect was shown to be far more likely. For example, although the complaint cited the letters to Marburger in 1983 from Assemblymen Yevoli and Kremer as evidence of community pressure, respondent's subsequent depositions of those individuals, which established that Kremer promptly rejected Yevoli's suggestion (77a, 81a-82a), precluded the inference Dube sought to draw. Although no contradictory evidence was ever adduced, the court of appeals did not appear to consider the testimony.

Similarly, respondent failed to substantiate his contention that his tenure review was "adversely impacted" by Marburger's receipt of letters from alumni who threatened to discontinue financial aid. Discovery established that only five such letters were received and that their impact on Stony Brook, a major, state-funded university center, had been negligible. (A. 853, 867-871). Moreover, respondent failed to even introduce these letters into the record. Thus, none of the evidence to which the second circuit alluded as support for the inferences respondent sought to draw was in fact sufficient, under *Matsushita*, individually or cumulatively to defeat petitioners' motion for summary judgment.

Respondent failed to adduce *any* evidence that tended to exclude the possibility that the petitioners acted for the reasons they offered. He presented no evidence that anyone with scholarly credentials similar to his own had been granted ten-

18 In fact, all of the petitioners faced the threat of an outcry from the AAUP, newspaper editorialists, and supporters of Dube if they denied tenure. Since controversy was inevitable and losing a desirable candidate would redound to the detriment of the institution, petitioners had no incentive to subvert the tenure process and make a decision other than on the merits.

ure. Similarly, he made no showing that other controversial candidates were denied tenure even when their scholarly records were markedly superior to candidates awarded tenure.

The second circuit erred in failing to measure the evidence through the "prism" of the appropriate substantive evidentiary burden. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254. Since each of the petitioners—experienced academic administrators—stated that deficient scholarship was the basis for his actions, and introduced evidence showing that there was general agreement, even among faculty supporters, that Dube's written scholarship was short of the usual standard, each showed his actions to be objectively reasonable. Each petitioner was entitled to qualified immunity from liability in damages because respondent, in opposing petitioners' summary judgment motion, failed to adduce sufficient evidence to place the issue of motive genuinely in contention under the *Matsushita* standard.

CONCLUSION

FOR THE REASONS STATED HEREIN, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated New York, New York
September 27, 1990

Respectfully submitted,

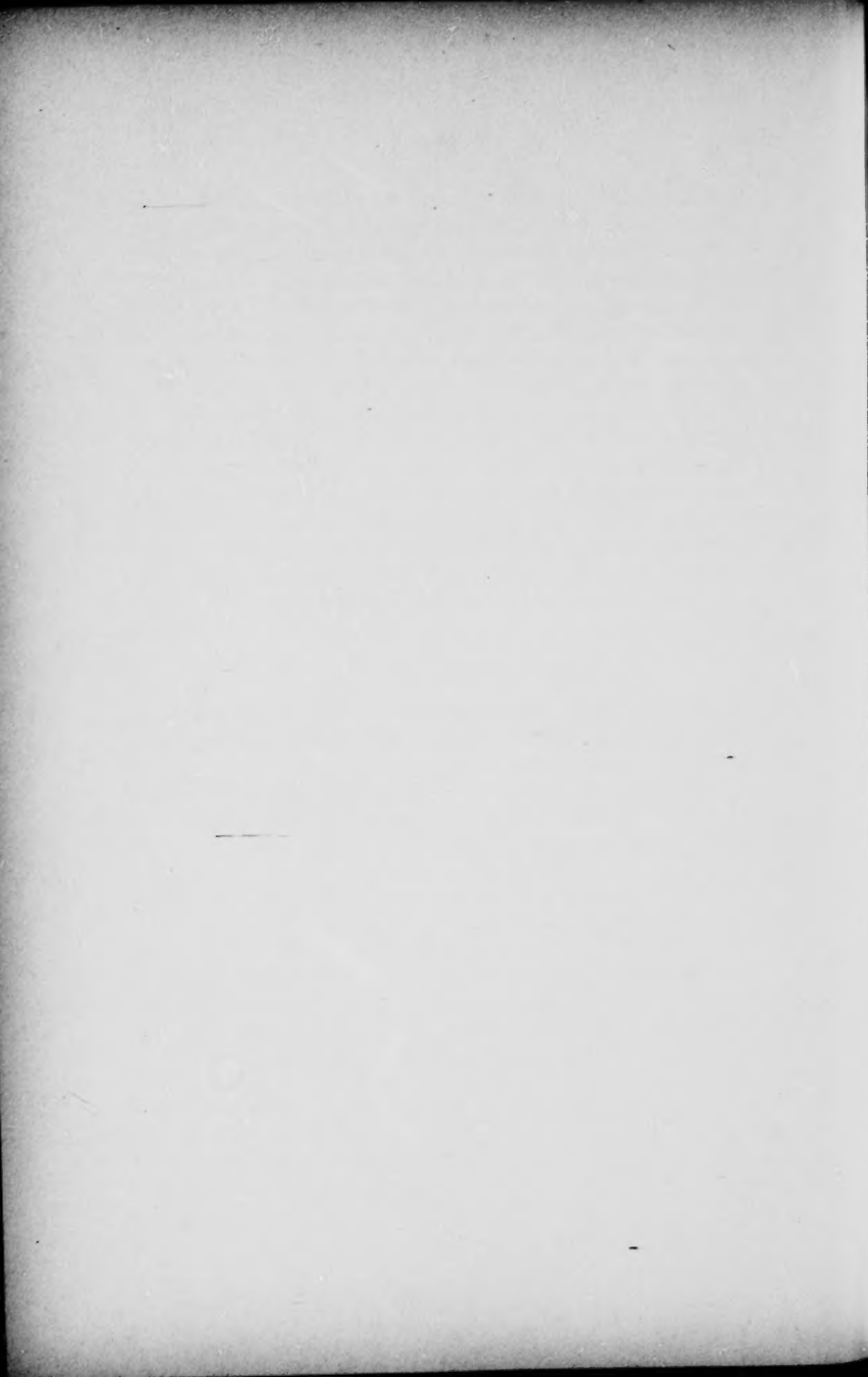
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APPENDIX



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 88-7980

(Seal of the Court of Appeals, 2d Circuit,
dated June 15, 1990
Elaine B. Goldsmith, Clerk)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the city of New York, on the 15th day of June, one thousand nine hundred and ninety.

PROFESSOR ERNEST F. DUBE, et al.,

Plaintiffs-Appellees,

—v.—

THE STATE UNIVERSITY OF NEW YORK, et al.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Defendants-Appellants, The State University of New York, et al.,

Upon consideration by the panel that hear the appeal, it is
Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 885—August Term, 1988

(Argued March 17, 1989 Decided April 12, 1990)

Docket No. 88-7980

PROFESSOR ERNEST F. DUBE, PROFESSOR WILLIAM
MCADOO, PROFESSOR AMIRI BARAKA, PROFESSOR
CAROLLE CHARLES, PROFESSOR LESLIE OWENS,
HAITIAN STUDENT ORGANIZATION, LATIN AMERI-
CAN STUDENT ORGANIZATION INTERNATIONAL
STUDENT ORGANIZATION, CARIBBEAN STUDENT
ORGANIZATION, and THIRD WORLD RESOURCES,

Plaintiffs,

PROFESSOR ERNEST F. DUBE,

Plaintiff-Appellee,

—v.—

THE STATE UNIVERSITY OF NEW YORK, CLIFTON R.
WHARTON, JR., Ex-Chancellor of the State Univer-
sity of New York, individually and in his official
capacity; JEROME KOMISAR, Acting Chancellor of
the State University of New York, individually and
in his official capacity; JOHN MARBURGER, Presi-
dent of the State University of New York at Stony

Brook, individually and in his official capacity;
 HOMER A. NEAL, Provost of the State University of
 New York at Stony Brook, individually and in his
 official capacity; ROBERT NEVILLE, Dean of
 Humanities and Fine Arts at the State University of
 New York at Stony Brook, individually and in his
 official capacity,

Defendants-Appellants.

B e f o r e :

MESKILL, MINER and MAHONEY,

Circuit Judges.

Interlocutory appeal from an order of the United States District Court for the Eastern District of New York, Mishler, J., granting in part and denying in part defendants-appellants' motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), and denying defendants-appellants' motion for summary judgment pursuant to Fed. R. Civ. P. 56. The district court (1) dismissed all claims brought under 42 U.S.C. § 1983 against the University and the individual defendants in their official capacities, except as to the prospective relief of reinstatement, and (2) denied summary judgment for the individual defendants in their individual capacities based, in part, on appellants' failure to establish their defense of qualified immunity.

Order modified and, as modified, affirmed with respect to Rule 12 motion; denial of Rule 56 motion affirmed in part and dismissed as moot in part.

Judge Miner concurs in a separate opinion; Judge Mahoney concurs in a separate opinion.

KATHIE ANN WHIPPLE, Assistant Attorney General, State of New York, New York City (Robert Abrams, Attorney General of the State of New York, O. Peter Sherwood, Solicitor General, Ellen Fried, Assistant Attorney General, State of New York, New York City, of counsel), *for Appellants*.

FRANK E. DEALE, Center for Constitutional Rights, New York City (Wilhelm Joseph, National Conference of Black Lawyers, New York City, Lennox S. Hinds, Aaron D. Frishberg, Stevens, Hinds & White, New York City, of counsel), *for Appellees*.

MESKILL, *Circuit Judge*:

This is an interlocutory appeal from an order of the United States District Court for the Eastern District of New York, Mishler, *J.*, granting in part and denying in part defendants-appellants' motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), and denying their motion for summary judgment pursuant to Fed. R. Civ. P. 56.

The litigation was commenced by plaintiff-appellee Ernest F. Dube, a former assistant professor at the State

University of New York at Stony Brook (Stony Brook), and others against defendants-appellants, the State University of New York (SUNY) and various SUNY officials, in their individual and official capacities, seeking monetary damages and injunctive relief pursuant to 42 U.S.C. § 1983.¹ In his complaint, Dube alleges that he was denied tenure in violation of his First Amendment rights, "based on [his] discussion of controversial topics in his classroom," and that he was denied due process of law in the tenure review process, in violation of his Fourteenth Amendment rights. Dube also pleads two pendent state law claims.

Defendants moved for (1) judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) on the ground that Eleventh Amendment immunity barred suit against SUNY and the individual defendants acting in their official capacities, and (2) summary judgment pursuant to Fed. R. Civ. P. 56. The district court granted the motion for judgment on the pleadings "except as to prospective relief for reinstatement." We modify this aspect of the district court's order to preclude any relief against SUNY, and any injunctive relief on Dube's state law claims, and, as modified, affirm.

The district court, however, denied defendants' motion for summary judgment, ruling that (1) genuine issues of material fact exist with respect to whether Dube was denied tenure because of the content of his classroom discourse, and (2) the individual defendants'

1 The claims of all plaintiffs except Dube have been dismissed with prejudice. These claims apparently related to the alleged First Amendment right of "Stony Brook's academic community, both students and professors, . . . to benefit from Dr. Dube's participation in the intellectual life of the college community." No appeal has been taken from this dismissal.

claims of qualified immunity should not preclude a trial on the merits. Because we conclude that a genuine dispute exists as to the subjective motivation of all individual defendants except Komisar, we affirm the denial of summary judgment on the merits and order the district court to enter summary judgment in Komisar's favor on all claims. Furthermore, as we conclude that Dube has failed to allege a protectable "liberty" or "property" interest, we order the district court to (1) dismiss Dube's Fourteenth Amendment claim, and, consequently, (2) dismiss as moot defendants' claim of qualified immunity from section 1983 liability on the Fourteenth Amendment claim. The denial of qualified immunity as to the individual defendants in their personal capacities with respect to the alleged First Amendment violation is affirmed.

BACKGROUND

Dube was hired by Stony Brook in 1977 as an assistant professor in its Africana Studies Program. He had come to the United States in 1967 after being expelled from his native South Africa for his outspoken opposition to apartheid. Before joining the Stony Brook faculty, Dube received a B.S. in psychology and sociology from the University of Natal in South Africa, and a Ph.D. in cognitive psychology from Cornell University. Dube's employment was governed both by the Policies of the SUNY Board of Trustees (the Policies) and by a collective bargaining agreement between United University Professions, Inc. (UUP), agent for Stony Brook professors, and the State of New York (the Agreement).

In the fall term of 1981, Dube began teaching a course in the Africana Studies Program designated

AFS/POL 319, "The Politics of Race." A description of this course, apparently prepared by Dube for the summer term of 1983, made reference to "[t]he three forms of racism and how they manifested themselves: 1) Nazism in Germany[,] 2) Apartheid in South Africa[, and] 3) Zionism in Israel." A similar description for the fall, 1983 term stated: "We will . . . end up by discussing the three main forms of racism: overt racism, covert racism, and reactive racism. Examples of all three forms of racism will be discussed for comparative purpose[s]; e.g., Nazism, apartheid, and Zionism."

Dube's complaint alleges that on July 15, 1983, Professor Selwyn Troen, a visiting professor from Ben Gurion University of the Negev in Israel, wrote a letter to Egon Neuburger, Dean of the College of Arts and Sciences at Stony Brook, in which Troen asserted that Dube, in AFS/POL 319, taught that "Zionism is as much racism as Nazism was racism and that 'the class was asked to share the instructor's view that there is an identity between the two.' " Troen's letter also allegedly accused Dube of using his position for the " 'propagation of personal ideology and racist biases.' " Copies of this letter were allegedly sent to defendant-appellant Homer Neal, Provost of Stony Brook, Vice-Provost Spanier, fourteen members of the Stony Brook faculty, and the news media.

In a written response to these allegations, Dube, on July 27, 1983, allegedly stated that

he had exposed his class to his own view that Zionism was not a monolithic ideology, but that among organizations and individuals identifying themselves as Zionists there were both groups with histories of espousing racist views and others who were not rac-

ist, and [he] had urged his students to avoid simplistic and stereotyped thinking.

The matter was subsequently investigated by the Executive Committee of the Stony Brook Senate, which unanimously determined Dube's teachings to be within the bounds of academic freedom. During August and September of 1983, the committee's position was ratified by Dean Neuberger, defendants-appellants Neal and John Marburger, President of Stony Brook, and the full University Senate by a vote of 55-14. This ratification, however, did not quell the growing furor.

Thereafter, the Long Island branch of the Anti-Defamation League of B'nai Brith and the American Jewish Committee allegedly "mounted a publicity and lobbying campaign directed at President Marburger, with an express aim to cause the University to repudiate Dr. Dube and to discontinue his teaching of 'The Politics of Race,' AFS/POL 319." Long Island Assemblyman Lewis Yevoli allegedly threatened to block funding for the Africana Studies Program in the Ways and Means Committee of the New York State Assembly if Dube was allowed to continue teaching AFS/POL 319, and New York Governor Mario Cuomo allegedly issued a statement condemning "the failure of the University community to denounce Dr. Dube." Marburger also received letters from Stony Brook alumni stating that they were discontinuing financial contributions and urging students not to enroll.

As a result of the controversy concerning AFS/POL 319, Marburger, on October 19, 1983, issued the following statement:

In view of the continuing concern regarding the position of the administration of the State University of New York at Stony Brook with respect to the course "The Politics of Race" taught by Professor Dube, I wish to clarify and reiterate that position so there will be no doubts about it.

The Stony Brook administration, for which I speak officially here, absolutely divorces itself from the views expressed in this course, and from any view that links Zionism with racism or nazism. Furthermore, I personally find such linkages morally abhorrent.

Several events have occurred subsequent to the incident that drew attention to Professor Dube's course that some have interpreted as implying a pattern of antisemitic behavior at Stony Brook. These events are each of them unfortunate, but in my opinion are unrelated to each other and to the course taught by Professor Dube.²

AFS/POL 319 was thereafter removed from the course listings of the political science department.

Dube became eligible for tenure during the 1983-84 academic year. However, due to the ongoing controversy surrounding AFS/POL 319, he requested, and was granted, a postponement of tenure review until the 1984-85 academic year. At that time, an *ad hoc* review committee was appointed to consider the matter and to provide a recommendation regarding Dube's potential tenure. No faculty member who, in Dube's view, had

2 A similar proposed press release, dated August 31, 1983, was presented by Donald M. Blinken, chairman of the SUNY board of trustees, to a meeting of the board on that date; however, it is not clear whether this release was ever issued to the public.

been allied with Troen in protesting Dube's teachings was appointed to the committee.

Upon review of Dube's publication record, university service, teaching evaluations and peer recommendations, the committee voted 6-1 in favor of recommending tenure, and 4-3 in favor of recommending promotion to associate professor. Although the committee acknowledged that "much of Professor Dube's expertise . . . has not been written down," that he "does not easily fit the 'mold' of the 'traditional' academic," and that consideration of his "life experiences" was necessary to obtain a "rounded assessment of his accomplishments," it nevertheless found Dube to be "an exciting, valuable, and not replaceable resource to Africana Studies, students, and the university community."

In accordance with established procedures, the matter was then reviewed by the Personnel Policy Committee, a standing committee elected by the faculty of the Stony Brook College of Arts and Sciences. By a vote of 4-3 this committee also recommended a grant of tenure, but unanimously voted against recommending promotion. The committee chairman's report to the Dean stated, in pertinent part:

There was general agreement that both the quantity and quality of written scholarship was short of the usual standards. Accordingly, there was in our discussion very little support for promotion. Fairness both to other candidates and to the scholarly goals of the University require that we recommend against promotion for the level of scholarly activity reflected by this record.

The matter was next considered by defendant-appellant Robert Neville, Dean of Humanities and Fine Arts at Stony Brook, who recommended that Dube be denied tenure and promotion. In Neville's opinion, Dube's publications were both less numerous than that generally required for tenure at Stony Brook, and did not evidence "the mature development of an intellectual project which we look for in granting faculty tenure." Neville was also of the opinion that

Africana studies has not yet fulfilled its potential or accomplished its mission at Stony Brook. It needs greatly to elaborate its relations with other departments Professor Dube's apparent withdrawal from academic psychology is not helpful. Africana Studies also needs to become a department and develop a graduate program in conjunction with other departments; Professor Dube's scholarly posture would be a hindrance here.

Upon receipt and review of all materials accumulated to that point, including Neville's recommendation, Neal then recommended denying both tenure and promotion. In a memorandum to Marburger, dated July 1, 1985, Neal stated that the Personnel Policy Committee's recommendation to grant tenure without promotion was "in exception to standard practice." Provost Neal also expressed his belief that "[c]ontinuing appointment at a major research university is warranted only when an individual has taken his or her unique experiences, training, background and insights and prodigiously translated them into a form, based on the rigors of scholarly traditions, that can be read and shared by scholars for generations to come." He concluded that Dube had not met

that standard because "Dr. Dube's publication record is extremely limited."

President Marburger concurred, and recommended denial of both tenure and promotion. In a letter to Dube, dated August 30, 1985, Marburger not only outlined the specific deficiencies in Dube's scholarly record, but also explained that the negative recommendations from Neville and Neal reflected their assignment of greater weight to scholarship, rather than a contradiction of the findings of the faculty committees.

Dube immediately appealed Marburger's decision and sought review by then SUNY Chancellor, defendant-appellant Clifton Wharton, Jr. Pursuant to Article 33 of the Agreement, an advisory committee was appointed as follows: Dube and Marburger each selected one committee member, and those members then selected a third individual to serve as the committee's chair. After reviewing all relevant materials, the advisory committee unanimously recommended granting tenure without promotion. The committee report described Dube as "a good teacher [who] gives a great deal of himself to students on an informal basis, as an advisor, and in directing independent study and readings." The committee also noted Neville's admiration for Dube as a "cultural resource," and Neville's observation that "few people now in the Western world have been as involved as [Dube] in the affairs of Africa."

However, before Wharton was able to render a decision, the advisory committee's report was disclosed to the press and to the American Association of University Professors (AAUP), a labor organization in competition with the UUP, who urged that Dube be tenured. In response to what, in Wharton's opinion, "represented a

breach of . . . the basic principles of confidentiality inherent in the tenure review process," he deemed it necessary to convene a second advisory committee prior to rendering his decision. During the interim, Dube's appointment was extended through February 28, 1987.

The second advisory committee, appointed via the same procedure as its predecessor, recommended that Dube be granted tenure without promotion or, in the alternative, that his contract be extended for three years, with tenure and promotion to be considered during the third year. The committee noted that "Professor Dube's publication record has been below the levels normally considered adequate for promotion and tenure at SUNY/Stony Brook," but also observed that "the problems that relate to his teaching about racism certainly interfered with his research and writing activities."

However, by letter, dated January 30, 1987, Wharton informed Dube of his decision to deny Dube tenure at Stony Brook. Wharton stated that research and publication must be weighted more heavily at a graduate/research comprehensive university such as Stony Brook than at undergraduate universities, and that Dube's record had justifiably been found to be deficient by Stony Brook standards. Wharton also acknowledged the likelihood that the tenure decision would be viewed as tainted by the controversy concerning Dube's teaching, stating:

If an adverse tenure decision is made, your critics will claim that it is a vindication of their charge of impropriety in your teaching and your advocates will claim that the decision was based upon racial/religious biases. If a positive tenure decision is made, your critics will claim that it represents a reaffirmation of the content of your teaching and

your advocates will claim a victory against racial/religious bigotry and for the content of your teaching. In neither case will the true bases of the decision be seen as the traditional ones, that is, the quality of your performance in teaching, research and public service.

Accordingly, Dube's appointment at Stony Brook was to be terminated on August 31, 1987.

On February 1, 1987, defendant-appellant Jerome Komisar succeeded Wharton as Acting Chancellor of SUNY. As Acting Chancellor, Komisar took no action with respect to Dube's candidacy for tenure, except to inform the AAUP by letter, dated March 9, 1987, that "there is simply no basis for intervention by AAUP in SUNY's collectively-negotiated tenure procedure."

Dube filed suit under 42 U.S.C. § 1983, on May 19, 1987, seeking compensatory and punitive damages against the individual defendants in their individual capacities, and a permanent injunction that would require defendants to appoint Dube to a tenured position at Stony Brook.³ The complaint pleaded four causes of action: first, "Chancellor Wharton's denial of tenure and of a continuing appointment at Stony Brook violated Dr. Dube's right to free speech guaranteed by the First Amendment" because it was "based on Dr. Dube's discussion of controversial topics in his classroom;" second, "Wharton's distortion of the Chancellor's review process in an attempt to obtain a recommendation adverse to Dr. Dube, his aborting of the

3 The complaint also sought a preliminary injunction requiring defendants to continue Dube's employment at Stony Brook during the pendency of the action. A motion for that relief was denied and no appeal has been taken from the denial.

Chancellor's review process, and his unilateral decision to deny Dr. Dube tenure based on reasons irrelevant to the tenure criteria established by the university, deprived Dr. Dube of due process of law, guaranteed by the Fourteenth Amendment;" third, "Chancellor Wharton's deliberate disregard of the recommendations of the Review Committees and refusal to make a tenure decision in good faith after consideration of the Review Committees' reports violated Dr. Dube's rights under [(1)] the contractual agreement between the University and the U.U.P. . . . [, and (2)] the guarantee in the University-UUP agreement of the full freedom of faculty members to discuss their own subjects in the classroom without limitation;" and fourth, "[t]he denial to Dr. Dube of continued employment and tenure at Stony Brook is arbitrary and capricious, and violates the Constitution of the State of New York, the New York Civil Service Law, and the policies adopted by the Trustees of the State University of New York."

Defendants moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), and for summary judgment pursuant to Fed. R. Civ. P. 56, raising claims of Eleventh Amendment immunity from suit and qualified immunity—the primary concerns of this appeal. In affidavits submitted in support of the motion for summary judgment, each of the individual defendants, except Komisar, stated that his recommendation concerning Dube's tenure and promotion was based solely on the academic merits, and that the controversy concerning AFS/POL 319 was not a factor in the decision. Each affidavit also noted the specific academic considerations taken into account in arriving at the recommendation in question. Komisar provided an affidavit stating that he became Acting Chancellor after Wharton issued his deci-

sion denying Dube's appeal, and had no occasion to ratify, enforce or reconsider that decision.

Concluding that the Eleventh Amendment barred Dube's claims for monetary damages against both SUNY and the individual defendants in their official capacities, the district court dismissed those claims pursuant to Fed. R. Civ. P. 12(c) "except as to prospective relief for reinstatement." However, the motion for summary judgment, which sought "dismissal of claims against defendants in their individual capacit[ies]," was denied in total. With respect to Dube's First Amendment claim, the district court found that "[t]he trier of the facts may reasonably infer that 'but for' the exercise of his First Amendment right of free speech Dr. Dube would have been granted tenure." As to Dube's Fourteenth Amendment claim, the court found that "the same outside pressures" alleged to have infringed upon Dube's First Amendment rights may also have "interfered with his right to a fair hearing." No separate analysis was undertaken with respect to Dube's state law claims.

Finally, without addressing the issue of qualified immunity in the context of either constitutional claim asserted, the district court nevertheless denied defendants' motion for summary judgment based on their defense of qualified immunity. Noting that "[t]he relationship between the exercise of Dr. Dube's First Amendment rights [in the summer of 1983] and denial of tenure [in January 1987] appear to be distant both in time and subject matter," the court simply concluded:

The defense that defendants had a good faith belief of reasonable university officials that the denial of tenure was "based on Dr. Dube's file and

the standards applicable at Stony Brook and in light of clearly established law" . . . is not an answer to Dr. Dube's claim. Summary judgment is therefore denied based on the qualified immunity defense

. . . .

The evidence which defendants offer on the issue of qualified immunity may be offered in answer to Dr. Dube's claim as the reason for denying tenure. Defendants will have the opportunity of showing "that it would have reached the same decision as to [Dr. Dube's tenure] even in the absence of [the controversy over the subject matter of his course]." *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 . . . (1977).

Defendants now appeal from "each and every part" of the district court's order denying their motion for judgment on the pleadings and summary judgment "[that] is adverse to [them]."

DISCUSSION

A. *Eleventh Amendment Immunity*

Pursuant to what has become known as the "collateral order" doctrine, see *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), the denial of a motion to dismiss claims on absolute Eleventh Amendment immunity grounds is immediately appealable under 28 U.S.C. § 1291 if the immunity defense can be decided solely as a matter of law.⁴ *United States v.*

⁴ Since defendants base their appeal, both as to Eleventh Amendment immunity and to qualified immunity, on 28 U.S.C. § 1291, Dube's contention that defendants failed to request any certification pursuant to 28 U.S.C. § 1292(b) is not germane to the questions we must decide.

Yonkers Board of Educ., 893 F.2d 498, 502-03 (2d Cir. 1990); see *Eng v. Coughlin*, 858 F.2d 889, 894 (2d Cir. 1988); *Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 482 U.S. 906 (1987). Appellants contend that the ruling of the district court that granted dismissal of Dube's claim for all relief against SUNY and the defendants in their official capacities except for "prospective relief of reinstatement" should be broadened to bar both Dube's claim against SUNY for reinstatement and his pendent state law claims. We agree, and therefore modify the order of the district court to direct dismissal of all claims against SUNY, and to preclude any injunctive relief against the individual defendants in their official capacities on Dube's state claims.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." As we noted in *Dwyer v. Regan*, 777 F.2d 825 (2d Cir. 1985), *modified*, 793 F.2d 457 (2d Cir. 1986):

The Supreme Court has consistently held that the federal courts lack jurisdiction not only over suits against a state brought by citizens of other states, as the literal language of the Amendment provides, but also over suits against such states brought by their own citizens. Thus, it is clear that, with few exceptions, federal courts are barred from entertaining suits brought by a private party against a state in its own name.

Id. at 835 (citations omitted); see *Papasan v. Allain*, 478 U.S. 265, 276 (1986). Although Congress is empowered under section five of the Fourteenth Amendment to

override Eleventh Amendment immunity and "to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); see *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985); *Dwyer*, 777 F.2d at 835, it is well settled that 42 U.S.C. § 1983 does not constitute an exercise of that authority. *Quern v. Jordan*, 440 U.S. 332, 340-42 (1979). Therefore, since Dube's federal causes of action are brought under section 1983, "in the absence of consent[, any claims against] the State or one of its agencies or departments . . . [are] proscribed by the Eleventh Amendment." *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). "This bar exists whether the relief sought is legal or equitable." *Papasan*, 478 U.S. at 276.

For Eleventh Amendment purposes, SUNY "is an integral part of the government of the State [of New York] and when it is sued the State is the real party." *State Univ. of New York v. Syracuse Univ.*, 285 A.D. 59, 61, 135 N.Y.S.2d 539, 542 (3d Dep't 1954). Furthermore, SUNY has clearly not consented to suit in a federal forum. Thus, no relief, either legal or equitable, is available against SUNY. See *Fox v. Board of Trustees*, 649 F.Supp. 1393, 1397 (N.D.N.Y. 1986), *rev'd on other grounds*, 841 F.2d 1207 (2d Cir. 1988), *rev'd*, 109 S.Ct. 3028 (1989); *Williams v. State Univ. of New York*, 635 F.Supp. 1243, 1249-50 & n.4 (E.D.N.Y. 1986); *Lachica v. Jaffe*, 578 F.Supp. 83, 84-85 (E.D.N.Y. 1983). Accordingly, SUNY's motion to dismiss should have been granted in full.

On the other hand, a state official acting in his official capacity may be sued in a federal forum to enjoin conduct that violates the federal Constitution, notwithstanding the Eleventh Amendment bar. *Papasan*, 478 U.S. at 276-77; *Pennhurst*, 465 U.S. at 102; *Hutto v. Finney*, 437 U.S. 678, 692 (1978); *Ex parte Young*, 209 U.S. 123, 159-60 (1908); see *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (“a federal court’s remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury”). However, a federal court’s grant of injunctive relief against a state official may *not* be based on violations of state law. See *Pennhurst*, 465 U.S. at 106. Accordingly, the district court’s order must be modified to preclude any injunctive relief against the defendants acting in their official capacities on the basis of Dube’s state law claims.

Finally, we note that the conclusions derived from our Eleventh Amendment analysis are reinforced by a recent Supreme Court ruling interpreting 42 U.S.C. § 1983 in a non-Eleventh Amendment context. In *Will v. Michigan Department of State Police*, 109 S.Ct. 2304 (1989), the Court held that “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983,” and thus are not subject to liability for deprivations of constitutional rights thereunder. *Id.* at 2312. However, this holding was qualified with the statement that “a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the State.’ ” *Id.* at 2311 n.10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)).

The Eleventh Amendment, however, provides no immunity for state officials sued in their personal capacities. *See Farid v. Smith*, 850 F.2d 917, 920-23 (2d Cir. 1988). We therefore turn now to defendants' claims of qualified immunity.

B. *Qualified Immunity*

1. *Jurisdiction*

As in the case of the partial denial of defendants' Eleventh Amendment defense, the propriety of their interlocutory appeal from the denial of their motion for summary judgment on the issue of qualified immunity is governed by the "collateral order" doctrine. *See Cohen*, 337 U.S. at 546. Under the criterion articulated by the Supreme Court in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Id.* at 530. Dube contends, *inter alia*, that the existence of significant factual disputes precludes the exercise of appellate jurisdiction over the district court's denial of defendants-appellants' motion for summary judgment on the issue of qualified immunity. Appellants, on the other hand, argue that the collateral order doctrine "squarely support[s]" the present appeal. Although we conclude that the denial of appellants' qualified immunity defense is subject to immediate interlocutory review under the rule of *Mitchell v. Forsyth*, we do so based on the district court's failure to address the immunity defense on either Dube's First or Fourteenth Amendment claims.

Judge Mishler found that Dube's constitutional claims raised sufficient issues of fact to preclude summary judgment for the defendants. With respect to Dube's First Amendment claim, the district court concluded: "The trier of the facts may reasonably infer that 'but for' the exercise of his First Amendment right of free speech Dr. Dube would have been granted tenure." With respect to Dube's Fourteenth Amendment claim, the court similarly concluded that

if Dr. Dube sustains his claim that he was denied tenure because of the controversy over the exercise of his constitutional right of free expression, it may support his claim of the violation of his right to due process in that the same outside pressures interfered with his right to a fair hearing.

However, turning to defendants' qualified immunity defense, Judge Mishler inexplicably reasoned:

Dr. Dube neither claims that a denial of tenure violated his constitutional rights nor that the denial of tenure was in retaliation for the exercise of his First Amendment rights. We understand his theory of liability to rest on a claim that the university, through its President and Chancellor, failed to exercise the authority with which it was vested and permitted community outrage over the exercise of his First Amendment rights to deny him tenure. The defense that defendants had a good faith belief of reasonable university officials that the denial of tenure was "based on Dr. Dube's file and the standards applicable at Stony Brook and in light of clearly established law" . . . is not an answer to

Dr. Dube's claim. Summary judgment is therefore denied based on the qualified immunity defense.

Thus, even though Dube's complaint squarely presented both First and Fourteenth Amendment claims, we are unable to conclude that the district court addressed the qualified immunity defense on either constitutional claim. Viewed in the context of the quoted cryptic paragraph, the mere statement that "[s]ummary judgment is . . . denied based on the qualified immunity defense" is insufficient to dictate a contrary conclusion. Consistent with past precedent, we therefore hold that the denial of defendants' motion for summary judgment on the issue of qualified immunity is immediately appealable. See *Musso v. Hourigan*, 836 F.2d 736, 741 (2d Cir. 1988) ("interlocutory review is appropriate when a district court denies a motion for summary judgment *without addressing* a proffered qualified immunity defense").⁵

2. Analysis

It is well established that qualified immunity shields government officials performing discretionary functions from civil damages liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, the existence of immunity "turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v.*

⁵ It should be noted that, had the qualified immunity defense to Dube's constitutional claims been addressed and rejected by the district court, the author agrees with Judge Miner that appellate jurisdiction would be proper under *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

Creighton, 483 U.S. 635, 639 (1987) (quoting *Harlow*, 457 U.S. at 819, 818).

As discussed previously, although Judge Mishler found that Dube's First and Fourteenth Amendment claims raised sufficient issues of fact to preclude summary judgment for the defendants, he did not consider defendants' qualified immunity defenses to those claims. Since we conclude that Dube has failed to assert a protectable "liberty" or "property" interest, *see infra* Section C, defendants' claim of qualified immunity from section 1983 liability on Dube's Fourteenth Amendment claim is dismissed as moot. However, applying well settled summary judgment standards to defendants' claim of qualified immunity from section 1983 liability on Dube's First Amendment claim, we hold that the immunity defense must fail as a matter of law.

At the threshold, we note that under Fed. R. Civ. P. 56, "factual allegations in the pleadings of the party opposing the motion for summary judgment, if supported by affidavits or other evidentiary material, should be regarded as true by the district court." *Burtneiks v. City of New York*, 716 F.2d 982, 983-84 (2d Cir. 1983); *see Musso*, 836 F.2d at 742-43; *First Nat'l Bank of Cincinnati v. Pepper*, 454 F.2d 626, 629 (2d Cir. 1972). Furthermore, while our review of the record on appeal is *de novo*, *see H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 879 F.2d 1005, 1011 (2d Cir. 1989), all "inferences to be drawn from the [underlying] facts contained in the affidavits, attached exhibits, and depositions submitted below . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (*per curiam*); *see Poller v. Columbia Broad-*

casting Sys., Inc., 368 U.S. 464, 473 (1962); *Giacalone v. Abrams*, 850 F.2d 79, 85-86 (2d Cir. 1988); *Hawkins v. Steingut*, 829 F.2d 317, 319 (2d Cir. 1987); *Burtnieks*, 716 F.2d at 985; *Kletschka v. Driver*, 411 F.2d 436, 440 (2d Cir. 1969). See generally 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2716, at 643-46 (2d ed. 1983) ("The message is clear; the party who defended against the motion for summary judgment will have the advantage of the [appellate] court's reading the record in the light most favorable to him, will have his allegations taken as true, and will receive the benefit of the doubt when his assertions conflict with those of the movant.") (footnotes omitted). With these precepts in mind we turn to the defendants' claim of qualified immunity from section 1983 liability on Dube's First Amendment claim.

Without expressing any opinion on the merits of Dube's claims, we believe that Dube has proffered evidence from which a jury could find that defendants denied tenure and promotion to him in response to pressure exerted by government officials and community activists outraged by his teachings. We note, simply by way of example, both the Marburger statement, dated October 19, 1983, which "absolutely divorce[d]" the Stony Brook administration from the views expressed by Dube in AFS/POL 319, and Wharton's letter to Dube, dated January 30, 1987, which certainly established that the controversy concerning Dube's teaching about Zionism was on Wharton's mind during his decision-making process. This and other evidence, viewed in the light most favorable to Dube and in the context of the public protests and threats to defund Stony Brook programs, could lead a reasonable jury to find that Dube was denied tenure as a result of the controversy surrounding

his teaching. For purposes of this appeal, therefore, we take Dube's assertion of retaliatory motive as true.

Thus, in the procedural context of summary judgment, the relevant inquiry on review is reduced to whether the defendants are immune from suit *if* the facts are as asserted by Dube—*i.e.*, whether, in light of clearly established law, it was objectively reasonable for SUNY officials to believe that denying tenure to Dube in retaliation for the exercise of his First Amendment rights was lawful. *See Anderson*, 483 U.S. at 641; *Dobosz v. Walsh*, 892 F.2d 1135, 1141 (2d Cir. 1989); *Musso*, 836 F.2d at 742-43. This purely legal question, which conclusively determines the issue of qualified immunity, must be answered in the negative, as the facts alleged by Dube unequivocally support his claim of violation of long-standing and clearly established First Amendment law.

In this regard, we need only note that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The Supreme Court has repeatedly emphasized the importance of the classroom as the “marketplace of ideas,” stating in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957):

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and

distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id. at 250.

Thus, while we recognize that courts should accord deference to academic decisions, see *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *Clements v. County of Nassau*, 835 F.2d 1000, 1004-05 (2d Cir. 1987), for decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation "that cast a pall of orthodoxy" over the free exchange of ideas in the classroom. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); cf. *Mt. Healthy City School Dist. Board of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 574-75 & n.14 (1972); *Perry v. Sindermann*, 408 U.S. 593, 596-98 (1972); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). We therefore conclude that, assuming the defendants retaliated against Dube based upon the content of his classroom discourse, such conduct was, as a matter of law, objectively *unreasonable*. Cf. *Krause v. Bennett*, 887 F.2d 362, 371-72 (2d Cir. 1989) (holding defendant New York state trooper's determination to arrest plaintiff objectively reasonable, as a matter of law). Accordingly, the defendants are *not* qualifiedly immune from section 1983 liability on Dube's First Amendment claim.

The practical effect of this ruling is twofold: first, Dube's First Amendment claim will proceed to trial and, as Judge Mishler observed, defendants may defend against that claim on the merits by contending that they denied tenure and promotion to Dube for permissible

academic reasons, without regard to community pressure triggered by Dube's teaching on Zionism and racism, and that the controversy resulting from that teaching did not affect the outcome of the decision regarding tenure and promotion, *see Mt. Healthy*, 429 U.S. at 287; and, second, the defense of qualified immunity is removed from the case.

C. Non-immunity Questions

As indicated earlier, appellate jurisdiction in this case is premised on the denial of defendants' Eleventh Amendment immunity and qualified immunity defenses. However, having jurisdiction of the appeal, we have discretion to consider other arguments, not on their own meriting interlocutory review under *Cohen*, "where there is sufficient overlap in the factors relevant to the appealable and nonappealable issues to warrant our exercising plenary authority." *United States v. Gerena*, 869 F.2d 82, 84 (2d Cir. 1989); *see American Motorists Ins. Co. v. United Furnace Co.*, 876 F.2d 293, 302 (2d Cir. 1989) (otherwise unappealable denial of summary judgment reviewed in interests of judicial economy); *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 255 (2d Cir. 1984) (same), *cert. denied*, 470 U.S. 1035 (1985). In the interests of judicial economy we therefore exercise our pendent appellate jurisdiction and entertain several non-appealable yet "overlapping" issues.

With respect to Dube's First Amendment claim, which alleges a denial of tenure "based on [his] discussion of controversial topics in his classroom," we agree with the district court that a genuine issue of material fact exists regarding the defendants' subjective motivation. The defendants' motion for summary judgment on the mer-

its of Dube's First Amendment claim was therefore properly denied.⁶ See *Patrick v. LeFevre*, 745 F.2d 153, 159 (2d Cir. 1984) (summary judgment typically inappropriate "where subjective issues regarding a litigant's state of mind, motive, sincerity or conscience are squarely implicated"). See generally 10A C. Wright, A. Miller & M. Kane, *supra*, § 2732.

On the other hand, Dube's Fourteenth Amendment claim, which asserts a lack of procedural due process in the promotion and tenure review procedure, must fail. We simply note that even though Dube alleges that Wharton's distortion of the review procedure deprived him of due process of law, any constitutional constraints on SUNY's review procedure necessarily depend on whether the interest asserted by Dube falls within the Fourteenth Amendment's protection of "liberty" or "property." See *Perry*, 408 U.S. at 599-603; *Roth*, 408 U.S. at 569-78; see also *Mt. Healthy*, 429 U.S. at 283. For example, a claim to tenure constitutes a protected property interest only if it amounts to a "legitimate claim of entitlement" thereto. *Roth*, 408 U.S. at 577. Based on the record before us, which indicates only that Dube was entitled to be considered for tenure in accordance with established contractual procedures, we conclude that Dube has failed to meet the threshold requirement of establishing a protectable "liberty" or

6 It is questionable whether Dube's First Amendment claim is well pleaded against individual defendants other than Wharton, since it is directed only to "Wharton's denial of tenure and of a continuing appointment." However, the parties have argued the issue to us in broader terms, and in view of the ease with which the complaint could be amended to correspond to the actual contentions of the parties, see Fed. R. Civ. P. 15(b), we have addressed these contentions in this opinion.

"property" interest.⁷ See *Clemente v. United States*, 766 F.2d 1358, 1364-65 (9th Cir. 1985) (procedural requirements, which provided no significant restrictions on decision-maker or articulable standards to guide his discretion, held not to establish Fourteenth Amendment property interest), *cert. denied*, 474 U.S. 1101 (1986); *Siu v. Johnson*, 748 F.2d 238, 243 n.11 (4th Cir. 1984) (established procedures relating to tenure review held not to constitute Fourteenth Amendment property interest); *Shango v. Jurich*, 681 F.2d 1091, 1101 (7th Cir. 1982) (state created procedural right held not to constitute Fourteenth Amendment liberty interest); *Bills v. Henderson*, 631 F.2d 1287, 1298-99 (6th Cir. 1980) (procedural rules created by state administrative bodies held not to establish protected Fourteenth Amendment liberty interest); *Jones v. Kneller*, 482 F.Supp. 204, 210 (E.D.N.Y. 1979) (contractual right of tenure review and confrontation held not to give rise to Fourteenth Amendment property interest), *aff'd mem.*, 633 F.2d 204 (2d Cir.), *cert. denied*, 449 U.S. 920 (1980). But see *Skehan v. Board of Trustees*, 590 F.2d 470, 485 (3d Cir. 1978) (professor seeking tenure held to have property interest in procedures established by college's statement

7 Specifically, Article 33 of the Agreement provides that where, as here, a college president has decided against renewal of an appointment despite the recommendations of both academic review committees that have considered the matter, the aggrieved employee is entitled to a further review by the SUNY Chancellor. The Chancellor is required to utilize the advisory committee mechanism (the alleged manipulation of which by Wharton constitutes the basis of Dube's second federal claim for relief); however, regardless of the advisory committee's recommendation, "the Chancellor, pursuant to the Policies of the Board of Trustees, shall . . . take such action as may, in the Chancellor's judgment, be appropriate." Moreover, Article 33 specifies that its provisions "shall not be deemed to create any manner of legal right, interest, or expectancy in any appointment to continuing appointment or permanent appointment."

of policy), *cert. denied*, 444 U.S. 832 (1979). We therefore direct dismissal of Dube's Fourteenth Amendment claim in its entirety.

We also find no support for *any* claim against Komisar, who succeeded Wharton as Acting Chancellor after Wharton made his final decision concerning the Dube matter. Komisar merely responded to a letter from the AAUP that requested reconsideration of the Dube situation by writing that, in view of the Agreement between SUNY and UUP, "there is simply no basis for intervention by AAUP." This alleged "ratification and enforcement" of Wharton's denial of Dube's Article 33 appeal is simply insufficient to impose either section 1983 or state law liability upon Komisar. *Cf. Musso*, 836 F.2d at 743 (no legal liability for "failing to prevent" another from violating plaintiff's First Amendment rights). Accordingly, all claims against Komisar should be dismissed.

Finally, no reason has been advanced why, at this stage of the litigation, Dube should not be allowed to proceed with his pendent state law claims. Therefore, with the exception that the state law claims can provide no basis for injunctive relief against the remaining defendants, the district court properly denied defendants' motion for summary judgment on Dube's claims based on state law.

CONCLUSION

In light of the foregoing, we (1) modify the partial grant and partial denial of defendants' motion for judgment on the pleadings and order (i) all claims against SUNY dismissed, and (ii) the preclusion of *any* injunc-

tive relief based upon Dube's state law (third and fourth) claims, and affirm as modified, (2) affirm the denial of defendants' motion for summary judgment on the issue of qualified immunity with respect to the First Amendment claim, (3) dismiss as moot defendants' motion for summary judgment on the issue of qualified immunity with respect to the Fourteenth Amendment claim, (4) modify the denial of defendants' motion for summary judgment on the merits and order (i) summary judgment to be entered in favor of Komisar as to *all* claims against him, and (ii) dismissal of Dube's Fourteenth Amendment claim.



MINER, *Circuit Judge*, concurring:

I agree with each and every conclusion reached in Judge Meskill's comprehensive opinion and with the reasoning supporting those conclusions. I write only to note my disagreement with the basis asserted for appellate jurisdiction as regards the qualified immunity defense.

The opinion for the court recites that "without addressing the issue of qualified immunity in the context of either constitutional claim asserted, the district court nevertheless denied defendants' motion for summary judgment based on their defense of qualified immunity." *Ante* at _____. It seems to me, however, that the issue of qualified immunity as a defense to the constitutional claims asserted was clearly addressed in the opinion of the district court. After referring to Dr. Dube's "claim that he was denied tenure because of the controversy over the exercise of his constitutional right of free expression" and "his claim of the violation of his right

to due process in that the same outside pressures interfered with his right to a fair hearing," the learned district judge concluded, following a discussion of how qualified immunity operates as defense to constitutional claims: "Summary judgment is therefore denied based on the qualified immunity defense."

In dealing with defendants' motion for summary judgment, the district court reviewed and ruled on the qualified immunity defense to the constitutional claims pleaded by plaintiff. Accordingly, our appellate jurisdiction as regards this defense should be predicated on *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (denial of the claim of qualified immunity subject to interlocutory review), rather than on *Musso v. Hourigan*, 836 F.2d 736, 741 (2d Cir. 1988) (failure to rule on qualified immunity defense subject to interlocutory review).

MAHONEY, *Circuit Judge*, generally concurring:

It is a little difficult to know how to label this separate opinion. Although I am in general agreement with Judge Meskill's thoughtful opinion for the court, it is precisely aspects of the "result" that cause me some difficulty. It would thus be especially inappropriate to say that I concur in the "result;" I therefore "generally" concur.

Specifically, our cases seem to call for dismissal of an appeal for lack of appellate jurisdiction, rather than affirmance of a denial of summary judgment, where a defendant invokes qualified immunity but is required to go to trial because there exist material issues of fact with respect to that defense, *see, e.g., United States v.*

Yonkers Branch-NAACP, 893 F.2d 498, 502-04 (2d Cir. 1990); *Francis v. Coughlin*, 891 F.2d 43, 44 n.1 (2d Cir. 1989), as we determine to be the case here with respect to the defense of qualified immunity to Dube's first amendment claim.

More fundamentally, the portion of Judge Meskill's opinion which addresses qualified immunity concludes, inexplicably in my view, that "the defendants are *not* qualifiedly immune from section 1983 liability on Dube's First Amendment claims," and that as a result of this ruling, "the defense of qualified immunity is removed from the case." Concededly, any defense of qualified immunity at trial would substantially, if not totally, overlap with defendants' case on the merits. All that has happened, however, is that defendants' motion for summary judgment, asserting the defense of qualified immunity to Dube's first amendment claim, has been denied, and we have ratified that denial. The denial of a motion for summary judgment leaves the question at issue in the case, and does not, without more, decide that question in favor of the movant's adversary.

With these qualifications, I join in Judge Meskill's opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 87-1599

PROFESSOR ERNEST F. DUBE, PROFESSOR WILLIAM MC-
ADOO, PROFESSOR AMIRI BARAKA, PROFESSOR
CAROLLE CHARLES, PROFESSOR LESLIE OWENS, HAI-
TIAN STUDENT ORGANIZATION, LATIN AMERICAN STU-
DENT ORGANIZATION, INTERNATIONAL STUDENT
ORGANIZATION, CARIBBEAN STUDENT ORGANIZATION,
THIRD WORLD RESOURCES,

Plaintiffs,

—against—

THE STATE UNIVERSITY OF NEW YORK, CLIFTON R. WHAR-
TON, Jr., ex-Chancellor of the State University of New
York, individually and in his official capacity; JEROME
KOMISAR, Acting Chancellor of the State University of
New York, individually and in his official capacity; JOHN
MARBURGER, President of the State University of New
York, at Stony Brook, individually and in his official
capacity; HOMER NEAL, Provost of the State University
of New York at Stony Brook, individually and in his offi-
cial capacity; ROBERT NEVILLE, Dean of Humanities and
Fine Arts at the State University of New York at Stony
Brook, individually and in his official capacity,

Defendants.

Memorandum of Decision and Order

October 14, 1988

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MISHLER, *District Judge*

Professor Ernest F. Dube instituted this action on claims that he was denied tenure and promotion as a professor at the State University of New York, Stony Brook ("SUNY") in violation of his First Amendment right of free speech (First Cause of Action) and his Fourteenth Amendment right to due process relating to the review procedure established at

the university (Second Cause of Action), 42 U.S.C. § 1983. Professor Dube also alleges two pendent state claims: breach of the labor agreement between the State of New York and the United University Professors, Inc. (Third Cause of Action), and violation of his right to continued employment under "the Constitution of the State of New York the New York Civil Service Law and the policies adopted by the Trustees of the State University of New York" (Fourth Cause of Action).

The basis of Professor Dube's First Amendment claim is based on allegations stated in his complaint under the caption "Facts."¹

Professor Dube was hired by the Department of Psychology and Africana Studies Program in 1977. In the Africana Studies Program he "developed courses in African history, African politics, contemporary Africa and racism." (Par. 17 and 18). "On July 15, 1983, Professor Selwin K. Troen, a visiting professor at Stony Brook from Ben Gurion University of the Negev in Israel wrote a letter to Egon Neuberger, Dean of the College of Arts and Sciences at Stony Brook, alleging that in the course "The Politics of Race" (Africana Studies/Political Science 319) Dr. Dube was employing his position for the 'propagation of personal ideology and racist biases.' " (Par. 23). On or about July 15, 1983, "Professor Troen alleged that Dr. Dube had taught that Zionism is as much racism as Nazism was racism and that 'the class was asked to share the instructor's view that there is an identity between the two.' " (Par. 23).

On or about July 27, 1983, in response to receipt by Dr. Dube of a copy of Professor Troen's letter from Dean Neuberger, Dr. Dube advised Dean Neuberger "that he had exposed his class to his own view that Zionism was not a monolithic ideology, but that among organizations and individuals identifying themselves as Zionists there were both

1 The "facts" are stated in 90 paragraphs. We refer only to those allegations directly bearing on his First Amendment claim.

groups with histories of espousing racist views and others who were not racist, and had urged his students to avoid simplistic and stereotyped thinking." (Par. 26).

Copies of Professor Troen's letter were sent to Stony Brook professors and the media. (Par. 24). The letter triggered responses from the Anti-Defamation League and the American Jewish Committee by mounting "a publicity and lobbying campaign directed at President Marburger, with the express aim to cause the University to repudiate Dr. Dube and to discontinue his teaching of "The Politics of Race." (Par. 36). The allegations state that the campaign resulted in some alumni discontinuing financial support and public officials joining in pressuring the university to deny both tenure and promotion to Dr. Dube. Professor Dube seeks injunctive relief directing the university to appoint him to a tenured position and compensatory and punitive damages.

Individual defendants are joined in their individual and official capacities for participating in the decision of the university.

Defendants' answer denies all the material allegations of the complaint and asserts, *inter alia*, affirmative defenses of qualified immunity and sovereign immunity under the Eleventh Amendment.

Defendants move (1) to dismiss pursuant to Fed. R. Civ. P. 12(c) on the ground that the Eleventh Amendment bars suits against the state and against the individual defendants acting in their official capacities, and (2) for summary judgment pursuant to Fed. R. Civ. P. 56(c).

Statement of Facts

The following facts have been conceded or are not disputed: Professor Dube was hired by SUNY as an assistant professor in the Africana Studies Program, effective September 1, 1977. The appointment was for a one-year term which expired on August 31, 1978. Dr. Dube also received a temporary unsalaried joint appointment as an assistant professor in the Department of Psychology. He received a two-year appointment from September 1, 1978 through August 31,

1980 as an assistant professor, and then a three-year appointment from September 1, 1980 to August 31, 1983. However, he requested and was granted a leave of absence for the academic year 1980-1981. When he returned to Stony Brook in 1981, he was designated to serve as acting director of the Africana Studies Program, since the director, Dr. Leslie Owens, was on leave for the academic year beginning September 1, 1981.

Under the policies of the SUNY Board of Trustees a tenure review for Dr. Dube was mandatory for the academic year 1983-84. In the summer of 1983 a controversy arose over the subject matter of Dr. Dube's course on "The Politics of Race (AFS/POL 319)." By memorandum dated November 14, 1983, Dr. Dube requested that his tenure review be postponed citing as a reason that "There has been so much noise about the course AFS/POL 319 that I do not think any objective evaluation is possible right now." President John Marburger granted Dr. Dube's request and appointed him as a lecturer for the academic year 1984-85 and as an assistant professor for the academic year 1985-86. Dr. Dube was advised that pursuant to the labor agreement between SUNY and the United University Professors, Inc. and the policies of the Board of Trustees that in the event that tenure was not granted his employment at Stony Brook would terminate on August 31, 1986.

In accordance with the procedure established at Stony Brook for granting tenure and promotion an ad hoc committee was appointed by Dean Robert Neville ("Departmental Committee"). The Departmental Committee voted 6-1 in favor of granting Dr. Dube tenure; it voted 4-3 in favor of granting promotion to Dr. Dube from assistant to associate professor. The recommendations were forwarded on to the Personnel Policy Committee. The Personnel Policy Committee voted 4-3 in favor of granting tenure to Dr. Dube and unanimously against promotion. The chairman of the Personnel Policy Committee noted in a memorandum to Dean Robert Neville that "there was general agreement that both the quantity and quality of (Dr. Dube's) written scholarship was short of the usual standards."

Dean Neville recommended against both tenure and promotion in a memorandum to Provost Homer A. Neal of the Provostial Council, an advisory group. Provost Neal also considered the opinions of David C. Glass, Vice Provost for Research and Graduate Studies and Lester G. Paldy, Dean of the Center for Continuing Education recommending that Dr. Dube not be granted either tenure or promotion. Provost Neal forwarded his recommendation on to President John Marburger to deny tenure or promotion to Dr. Dube, noting that he disagreed with the Personnel Policy Committee's recommendation in that it was unusual to recommend tenure without promotion; he further pointed to Dean Neville's observation that "Dr. Dube's publication record is extremely limited."

President Marburger refused to recommend promotion or tenure to Dr. Dube. By letter dated August 27, 1985, President Marburger advised Dr. Dube of the reasons for his decision.

Dr. Dube sought review of President Marburger's decision by Chancellor Clifton R. Wharton, Jr. in accordance with the procedure established under the labor agreement between United University Professors, Inc. and the State of New York.

Chancellor Wharton sustained President Marburger's decision not to recommend tenure to Dr. Dube at Stony Brook. However, he extended Dr. Dube's term to August 31, 1987. Jerome Komisar became Acting Chancellor on February 1, 1987.

DISCUSSION

The Eleventh Amendment Bar

The Eleventh Amendment states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or presented against one of the United States by

Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment bars suits by citizens of its own state as well as "Citizens of another State." *Papason v. Allain*, 478 U.S. 265, 106 S. Ct. 2932, 2939 (1986); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 908 (1984). "This bar exists whether the relief sought is legal or equitable." *Papason*, *id.* Relief is barred "if the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else." *Papason*, 106 S. Ct., at 2940. However, prospective injunctive relief, such as reinstatement may be ordered against a state and its officials. *Edelman v. Jordan*, 415 U.S. 651, 666, 94 S. Ct. 1347, 1356 (1974).

The Eleventh Amendment bar extends to suits against individuals sued in their official capacities. *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 3105-06 (1985); *Pennhurst*, 465 U.S. at 101-02, 104 S. Ct. at 908-09.

The bar of the Eleventh Amendment extends to the defendant State University of the State of New York *Edelman*, 415 U.S. at 663, 94 S. Ct. at 1355. *See State University of N.Y. v. Syracuse University*, 285 A.D. 59, 61, 135 N.Y.S.2d 539, 542 (3rd Dep't 1954) ("The State University is an integral part of the government of the State and when it is sued the State is the real party. Education Law § 352 *et seq.* . . .").

Defendants have a right to a determination based on their Eleventh Amendment defense at the pleading state of the proceeding. *Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S. Ct. 2484 (1987) citing *Harris v. Deveau*, 780 F.2d 911, 913 (11th Cir. 1986) ("Absolute immunity is meant to protect not only from liability, but from going to trial at all.").

To that extent that defendants' motion seeks dismissal on the Eleventh Amendment bar, the motion is denied insofar as prospective relief of reinstatement is sought and granted with respect to all other forms of relief demanded against the

State University of New York, and defendants sued in their various official capacities.

The Motion for Summary Judgment

A suit for damages against an individual is not barred by the Eleventh Amendment because he happens to be a state official. *Dwyer v. Regan*, 777 F.2d 825, 836 (2d Cir. 1985).

Defendants' motion for summary judgment is directed against plaintiff's claim against the individual defendants personally for damages and against the State and the individual defendants in their official capacities for prospective injunctive relief.

We restate the general principles for the grant or denial of summary judgment. The moving party carries the heavy burden of establishing the absence of genuine issues of fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970). The "court must resolve all ambiguities and draw all reasonable inferences in favor of the party defending against the motion (citation omitted). *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 249 (2d Cir. 1985). The party opposing the motion "must set forth specific facts showing that there is a genuine issue for trial." *United States v. One Tintoretto Painting, etc.*, 691 F.2d 603, 606 (2d Cir. 1982); *Eastway, id.*

Defendants argue that the evidence presented by affidavit, deposition and exhibits clearly demonstrates that President Marburger's decision and Chancellor Wharton's review upholding President Marburger's decision denying tenure to Dr. Dube was based solely on Dr. Dube's lack of qualifications and that those decisions were in no way influenced by the controversy triggered by Professor Troen's charge.

Dr. Dube offers evidence that state legislators accepted Professor Troen's interpretation of Dr. Dube's course "The Politics of Race (AFS/POL 319)" and suggested that President Marburger eliminate it from Stony Brook's curriculum,

or face the possibility of loss of funds.² On April 19, 1984, Rabbi Arthur Seltzer, Long Island Regional Director of the Anti-Defamation League, met with Dr. Herbert Gordon, Deputy to the Chancellor for Governmental Relations of the State University of New York and Dr. Jerome Komisar, Provost of the State University of New York.³

Dr. Dube claims that he was denied tenure because of improper community pressure and not because he lacked qualifications for tenure. Where "state of mind, motive, sincerity or conscience are squarely implicated, summary judgment would appear to be inappropriate and a trial indispensable." *Patrick v. LeFevre*, 745 F.2d 153, 159 (2d Cir.,

2 Assemblyman Lewis J. Yevoli wrote President Marburger on October 7, 1983 in pertinent part:

I was appalled to learn that the State University of New York at Stony Brook has condoned a course, "Africana Studies", taught by Professor Ernest Dube, under the guise of academic freedom. . . . It is . . . possible since Stony Brook is a state facility, that the Executive Law may preclude public funds from being used to promote the premise advanced by the Africana studies course. Please be advised that I have requested a legal opinion on this point and will inform you of the same. You should also be aware that I have requested Assemblyman Arthur K. Kremer, Chairman of the Assembly's Ways and Means Committee, to thoroughly review the possibility of removing state funds from the Stony Brook budget proposed for the 1983-84 fiscal year, which would be used for the continuation of the Africana Studies course as it is presently constituted."

On October 18, 1983, Assemblyman Arthur K. Kremer wrote President Marburger addressing him as "Dear John", stating *inter alia*:

At this point many suggestions are being made about legislative action which, if followed, would be harmful to the campus generally.

3 Rabbi Seltzer and President Marburger issued a joint statement (dated April 24, 1984) which noted continuing discussions between the Anti-Defamation League and the Stony Brook administration which focused on:

First [was] the matter of administrative disassociation from the Zionism is racism equation. Second [was] a moral condemnation of the equation. Third [was] the establishment of university mechanism both to articulate the relationship between the principles of academic freedom and academic responsibility as well as to establish recognized procedures for addressing charges of the abuse of academic professionalism within the university.

1984). This is particularly true in civil rights actions. Wright, Miller and Kane, *Federal Practice and Procedure Civil 2d* § 2732.2. See *Perry v. Sinderman*, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697 (1977); *Holley v. Seminole Country School Dist.*, 755 F.2d 1492, 1500 (11th Cir. 1985). The trier of the facts may reasonably infer that "but for" the exercise of his First Amendment right of free speech Dr. Dube would have been granted tenure. *Egger v. Phillips*, 669 F.2d 497, 502 (7th Cir. 1982), *cert. denied*, 464 U.S. 918, 104 S. Ct. 284 (1983). Egger claimed that he lost his employment as an F.B.I. agent in retaliation for his attempts to disclose the alleged corruption of another agent. The court noted:

In view of the large amount of documentary evidence submitted by the parties in the instant case, and the severely conflicting interpretations of the evidence advanced by the plaintiff and defendant, we do not believe that the defendants have succeeded in demonstrating the absence of any material issue of fact relevant to plaintiff's First Amendment claim.

Id. at 502.

Our discussion which focused on the First Amendment claim (First Cause of Action) is applicable to the other theories of liability, for if Dr. Dube sustains his claim that he was denied tenure because of the controversy over the exercise of his constitutional right of free expression, it may support his claim of the violation of his right to due process in that the same outside pressures interfered with his right to a fair hearing. The pendent state claims are here "in consideration of judicial economy, convenience and fairness to litigants." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct., 1130, 1139 (1966). The propriety of considering the state claims is unaffected by the resolution of the motions.

Qualified Immunity

We turn to that part of the defendants' motion that seeks summary judgment dismissing plaintiff's claim for damages

against the defendants in their individual capacity based on defendants' affirmative defense of qualified immunity.

The Court in *Anderson v. Creighton*, ____ U.S. ____, 107 S. Ct. 3034, 3038 (1987) explicated the basis for permitting the affirmative defense of qualified immunity as initially set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 272, 2738 (1982) as follows:

When government officials abuse their offices' action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees. *Harlow v. Fitzgerald*, 457 U.S. at 814, 102 S. Ct. at 2736. On the other hand, permitting damage suits against government officials can entail substantial societal costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. *Ibid.* Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.

Dr. Dube neither claims that the denial of tenure violated his constitutional rights nor that the denial of tenure was in retaliation for the exercise of his First Amendment rights. We understand his theory of liability to rest on a claim that the university, through its President and Chancellor, failed to exercise the authority with which it was vested and permitted community outrage over the exercise of his First Amendment rights to deny him tenure. The defense that defendants had a good faith belief of reasonable university officials that the denial of tenure was "based on Dr. Dube's file and the standards applicable at Stony Brook and in light of clearly established law" (Defendants' Memorandum at p. 52) is not an answer to Dr. Dube's claim. Summary judgment is therefore

denied based on the qualified immunity defense.⁴ The relationship between the exercise of Dr. Dube's First Amendment rights and denial of tenure appear to be distant both in time and subject matter. During the period from teaching the course in the summer of 1983 to Chancellor Wharton's action sustaining President Marburger's decision in January 1987, Dr. Dube was appointed as a lecturer (1984-85), professor (1985-86) and permitted to teach the course on "The Politics of Race" without limitation.

The evidence which defendants offer on the issue of qualified immunity may be offered in answer to Dr. Dube's claim as the reason for denying tenure. Defendants will have the opportunity of showing "that it would have reached the same decision as to [Dr. Dube's tenure] even in the absence of [the controversy over the subject matter of his course]." *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977).

Defendants cite *Giacalone v. Abrams*, 850 F.2d 79 (2d Cir. 1988) in support of their request for summary judgment. *Giacalone* involved the question of the propriety of terminating the employment of an Assistant Attorney General in the New York State Department of Law. The court found that under the test of balancing "the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35 (1968), defendants were entitled to summary judgment. The court citing *Anderson*, 107 S. Ct. at 3039, noted "Qualified immunity analysis requires the court to consider the operation of the rule in the context of 'the circumstances with which the official was confronted' *id.*" *Giacalone* at p. 85.

4 We are aware that when the defense is available summary judgment is usually granted. *Harlow*, 457 U.S. at 819, n.35, 102 S. Ct. at 2739, n.35; *Mitchell v. Forsyth*, 422 U.S. 511, 526, 105 S. Ct. 2806, 2815 (1985) ("the entitlement is an immunity from suit rather than a mere defense").

ORDER

The motion pursuant to Fed. R. Civ. P. 12(c) to dismiss the claims against the State University of New York and the individual defendants in their official capacity is granted except as to prospective relief for reinstatement and as to such relief the motion is denied. The motion for summary judgment pursuant to Fed. R. Civ. P. 56 for dismissal of claims against defendants in their individual capacity for damages is denied.

SO ORDERED.

Jacob Mishler /s/
U.S.D.J.

**EXCERPTS FROM THE RECORD BEFORE THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK**

Ex. B. to Neville Affidavit

Committee Statement on the Tenure Case of Ernest Frederick Dube written by Leslie H. Owens, Committee Chairman

Professor Ernest Fred Dube's qualifications as a scholar, teacher, and community activist pose important considerations for a university community's deliberations about the varied talents and resources it deems valuable to have in its faculty pool. In many areas Professor Dube possesses the kinds of intimate experience in and knowledge of African history, politics, languages, and educational systems that are rarely seen or duplicated in the university setting. A native of South Africa and a victim of its apartheid and prison systems, Professor Dube has long been active with concerned groups engaged in educating world opinion about reforms needed to recast South Africa's oppressive racial patterns of government. Much of his urging has been done as a spokesman for the ANC (African National Congress), one of two officially recognized groups speaking for South Africa in the United Nations.

In this light, his academic home—the Africana Studies Program (AFS)—has come to regard him as a natural resource whose abilities can be clearly observed and appreciated in the classroom as well as in the local, national, and international communities where he has become well known. For his colleagues in Africana Studies, Professor Dube's range of involvements are seen as irreplaceable life experiences. And the review committee believes that such experiences should be fairly weighed in any rounded assessment of his accomplishments.

Professor Dube's personal acquaintance and friendship with many of Africa's political, cultural, and educational leaders has earned him insights about African people and societies that few contemporary scholars can lay claim to. In particular the depth of his understanding about ongoing patterns of life in the so-called front line states—one of the most vital convergent points of world and diplomatic concern—and attempts to modernize their systems of life and govern-

ance underscore his presence in Africana Studies as an essential resource. While the review committee acknowledges that much of Professor Dube's expertise in these areas has not been written down, such expertise has, however, been recognized widely in national and international speaking arenas. On two occasions he has been awarded keys to the cities of San Francisco and Kansas City in recognition of his learning and activism in promoting international harmony.

Professor Dube's formal academic training is well grounded in cognitive psychology. But for evaluative purposes it is somewhat limiting to confine him to this area in assessing his skills and the contributions he has made to Stony Brook and the undergraduate Interdisciplinary Africana Studies Program. He does not easily fit the "mold" of the "traditional" academic and the Africana Studies Program has called upon him to help enrich its curriculum and course-offerings in both its psychological and African heritage areas. In this he has been successful in ways that no sound learning environment should ignore and that no other African specialist at Stony Brook can claim. His impact on students in and out of his courses has done much to enhance understanding about the relationships to and the relevance of Africa's heritage on the rest of the world. The committee believes that this is an important contribution in a world that finds expertise on African affairs in short supply although vitally needed. Perhaps in this context Professor Dube's continued presence at Stony Brook takes on even greater meaning. His knowledge of such important institutions as the family, male-female relationships, personal contacts in public and in private breathe needed vitality into his disciplines.

It is in this wider context that one gains a balanced view of Professor Dube and the nature of his academic and community contributions. During the only leave that he has taken while at Stony Brook (1980-81), he spent much of his time in Tanzania helping to establish a school for displaced immigrants of sub-Saharan African nations. He travels often and his participation in the creation of indigeneous schools in many areas of the continent is sought after and well known. In this arena his training in psychology has been important in

helping to refine his thinking about learning theory and the ways in which memory develops in accordance with one's traditional and ancestral upbringing. He is a pioneer researcher in this latter area, deeply committed to building workable models about African educational processes. He is also deeply concerned and speaks about education systems, their methods of imparting learning, and the characteristics and consequences of formal and informal education.

The small size of the Africana Studies Program has often meant that its faculty have had to play many and varied roles. During the 1981-82 academic year, Professor Dube, at the request of the Africana Studies faculty, served as chairman of the Program. By so doing he helped to institute the idea of a revolving chairmanship shared by all of the long term faculty. He did this while continuing his yearly involvement as a faculty advisor to the African Students Organization and while serving on university advisory committees. Such activities have on one side influenced the pace of his progress in the university setting but in other ways they have simply been part of the variety of activities that Professor Dube views as among his obligations in a free society. It seems appropriate to restate this point in any review since much of his life just prior to coming to the United States can be seen against a backdrop of his release from South Africa's notorious Robben Island prison in the late 1960s.

Available evidence from students and senior faculty observations discloses too that Professor Dube is a perceptive, balanced, and well-prepared instructor who has a friendly and mature relationship with his students. His teachings are analysis of ideas, theories, events, and nuances that sometimes take him into areas of controversy as he approaches a wide variety of subject matter in the best tradition of interdisciplinary studies. He is an excellent teacher; sitting in on one of his classes quickly confirms this. The most well-known example of his teaching is no doubt his course The Politics of Race (formerly AFS/POL 319). As a spin-off from AFS 319 Professor Dube has spent many hours talking with and explaining his thinking on race, his theory of reactive racism, and forms of racial discrimination in varied political systems

to visitors who have trekked to Stony Brook campus literally from many parts of the world to search him out.

The review committee has found its task both stimulating and involved. There is no question that Professor Dube's expertise and activities make him an exciting, valuable and not replaceable resource to Africana Studies, students, and the university community. His role as an activist-scholar cannot be over-stressed; it sets a standard that many aspire to but seldom reach. All members of the review committee commented favorably, as did several outside referees, on his writing samples and the freshness of their insight and contribution to learning in psychology, African studies, and diplomacy. His future writings, particularly his current comparative investigation of race in the United States and South Africa and the South African prison systems, hold out much hope for greatly expanding our appreciation of events in the Third World and the connection of these events to perceptions in the West.

The review committee expressed unanimous agreement that Professor Dube not be lost to Stony Brook. The majority of members of the committee recommended that he be granted tenure in the Africana Studies Program, and the minority expressed a desire that, short of tenure, some means be devised to retain Professor Dube as a valued member of the instructional staff at the university.

/s/ AMIRI BARAKA
Amiri Baraka, Associate
Professor, Africana Studies

/s/ LEWIS A. COSER
Lewis A. Coser, Distinguished Professor of
Sociology

/s/ LESLIE H. OWENS
Leslie H. Owens, Associate
Professor, Africana Studies

/s/ JOHN A. WILLIAMS
John A. Williams,
Associate Professor,
History

/s/ DANA BRAMEL
Dana Bramel, Professor of
Psychology

/s/ MARIA LUISA NUNES
Maria Luisa Nunes, Associate
Professor, Hispanic Languages
and Literature

/s/ BARBARA S. WEINSTEIN
Barbara S. Weinstein,
Associate Professor, History

Ex. C to Neville Affidavit

STONY BROOK

MEMORANDUM

TO: Robert Neville, Dean, Division of Humanities and Fine Arts

FROM: Richard N. Porter, Chair, College of Arts and Sciences Personnel Policy Committee

SUBJECT: Promotion and Tenure of Professor Ernest Dube

DATE: May 7, 1985

At its meeting on 7 May 1985, the Personnel Policy Committee supported the *ad hoc* committee's recommendation of tenure for Professor Ernest Dube, but failed to support their recommendation for promotion.

In the majority opinion of the PPC, Professor Dube's understanding of racism, gained primarily through experience, but to some extent through research, is unique at Stony Brook. As a serious and thought-provoking teacher, he helps students develop perspectives on this pervasive form of prejudice. There was general agreement that both the quantity and quality of written scholarship was short of the usual standards. Accordingly, there was in our discussion very little support for promotion. Fairness both to other candidates and to the scholarly goals of the University require that we recommend against promotion for the level of scholarly activity reflected by this record.

On the other hand, uniqueness and replaceability of a candidate's contributions to Stony Brook have also traditionally been focal points of the Committee's deliberations. On that score, the majority of the Committee considers a case for tenure to have been made by Professor Dube's teaching in the Africana Studies program and by his constructive leadership of many students who seek personal perspective in a pluralistic, competitive, and sometimes hostile society. In

addition, we recognized his wide reputation for oral communication of ideas.

In the minority opinion, the usual standards for written scholarship would be too severely compromised to recommend tenure. Were there such a position as Senior Lecturer with the permanence, but not title, of a tenured academic rank, there would have been wide support for Dube's appointment to it. And although the minority of the Committee would support his appointment as Senior Lecturer, the majority felt that renewal evaluation every few years would not be a secure basis for Professor Dube's contributions to the University.

There was general agreement among the members of the Committee about the facts and issues in this case. The differences between those subscribing to the majority and minority opinions were therefore about the weights that should be assigned to the various criteria in order to attain the goal of a great university serving a pluralistic society. The majority view is that the University would be intellectually poorer without Professor Dube's continuing contributions.

RMP/ml

Ex. D. to Neville Affidavit

STONY BROOK

MEMORANDUM

TO: Homer A. Neal, Provost

FROM: Robert C. Neville, Dean, Humanities and Fine Arts Division

SUBJECT: Promotion and Tenure For Professor Ernest F. Dube

DATE: 28 May 1985

Enclosed please find the file and supporting materials for the candidacy of Professor Dube for promotion to associate professor and continuing appointment. The Departmental Committee, which was supplemented by me with appointments of scholars from other departments in accordance with Personnel Policy Committee procedures, made a strong majority recommendation for tenure and a weak majority recommendation for promotion. The Personnel Policy Committee recommends for tenure and against promotion by a weak majority. Although there is divided opinion in this case, there are few if any disagreements about the pertinent facts. The disagreements rather are about what value to find in its various aspects. My own judgment, an extremely reluctant one, is to reject both the Departmental Committee and the Personnel Policy Committee recommendations and recommend instead that Professor Dube be granted neither tenure nor promotion. The following shall sort out the arguments that lead me to this conclusion.

At the outset it should be noted that nothing in the file whatsoever supports the kind of criticism raised against Professor Dube last year to the effect that he is a racist, an anti-Zionist, or an anti-Semite. The testimony in the file from outside reviewers and from students and faculty at Stony Brook overwhelmingly argues that his word and life are potent countervailing forces against bigotry and oppression in

all forms. A careful reading of all his course syllabi, especially those showing the evolution of AFS/POL 319, puts his infamous alleged remarks in benign perspective. It is precisely because of his teachings about racism that even those who argue that he should be denied tenure and promotion argue also that some other way be found to keep him at Stony Brook. Although some elements in the external Jewish community might want to see him dismissed, that desire cannot arise from a thorough reading of his teaching contributions.

The chief sticking point in Professor Dube's case is his publications which consist of three items: a portion of his dissertation published in an anthology edited by his mentor, an essay on racism and education forthcoming in the *Harvard Educational Review*, and an essay on American foreign policy toward South Africa.

The first is an interesting piece of research, interesting particularly in the steps it takes to develop a sophisticated methodology for estimating intelligence in cultures widely different from the American. The dissertation excerpt focuses on intelligence in memory, and one can imagine a large research project developing analogous investigations of intelligence in production and control, in analysis of enjoyed experiences, etc. Although the excerpt in the Neisser volume stands alone as a good piece of work, there is no thorough development or extension of the idea in Professor Dube's corpus. In fact, the excerpt published here was prepared by the volume editor, not by Professor Dube himself, as if he had lost interest in the project.

The second, "The Relationship Between Racism and Education in South Africa," does continue a general interest in intelligence, but this time as a function of achievements within certain curricula. The essay tells a stirring story of the strategies by which black leaders in South Africa continue to circumvent the discriminatory educational policies of the South African government. It would be a splendid research project for Professor Dube to undertake careful measurement of the effects of all the curricula concerned; but the present paper is only an outline. It also contains an outline of his views on racism, but not a thorough development. In neither

this paper nor the first is there the kind of mature bringing to fruition of an intellectual project that we require for tenure and promotion.

"The Reagan Administration's Policy Toward South Africa: Misunderstood or Understood" is an interesting essay in yet a different genre, that of political commentary. I am persuaded by its argument (actually, I agreed with Professor Dube's position even before reading the paper, and found the paper to supply many important details). For purposes of the present review, however, I have to point out that the essay aims to provide an interpretation that frankly adopts a specific side in the controversy. This is perfectly understandable and worthy, but it is not academic (perhaps this is a critique of the academy). The essay, for instance, criticizes the political rhetoric of the other side at the same time that it always names the South African government with the epithet "racist."

In sum, concerning publication, Professor Dube's list is not only far shorter than is usually required for tenure, but also does not contain the mature development of an intellectual project which we look for in granting faculty tenure. The question is whether this failing is outweighed by other factors, as both the Departmental Committee and the Personnel Policy Committee believe.

Regarding university service and teaching, viewed in the ordinary ways, Professor Dube surely has done what would merit tenure in other cases, all things being equal. He has chaired his unit, served on committees, and played a vital role in the development of Africana Studies. In addition, he has played an active role in expatriot politics of his native country, South Africa. As to teaching, the student evaluations show him to be respected and effective. He is not a "great teacher" in the sense of being a classroom performer, but he demands solid work of his students and they respond. The file contains a large batch of student letters testifying to his virtue. Most of the letters are worthless because they seem to follow a formula ("It has come to my attention that . . ."); it should be pointed out, however, that the letters written by students who have actually studied with Professor

Dube are far more literate than those from interested non-students, from which I would conclude that he has some effectiveness in teaching writing, a major emphasis of the African Studies Program. In general, it is clear that Professor Dube invests himself in students, spends time with them, counsels them to work harder, and presents them with difficult materials in ways which contribute to the strong sense of student-faculty community noted in the five year review last year.

What is special about Professor Dube, however, is not his service and teaching per se but the experience he brings to it. He is a cultural resource, as it were, a walking library and video collection. Few people now in the Western world have been as involved as he in the affairs of Africa. Few have thought about it in both practical and analytical ways as he has. Few continue to have the contacts with African cultural and political life. Therefore, besides being an articulate and warm human being, Professor Dube is what the Koreans would call a national treasure. For this reason, Professor Dube's case is not just the same as others in which the faculty member has perfectly adequate service and teaching but fails in scholarly research, cases where I would recommend a negative judgment (I've made two such recommendations this year).

In light of these considerations, how should we think about tenure and promotion? Valuable as Professor Dube's contributions are, I can't bring myself to see them as valuable enough in the ways that count for tenure and promotion.

With regard to scholarship, construed broadly to include creative writing, performance, etc., the difference between a judgment for contract renewal and a judgment for tenure is maturity. We must see whether a scholar has fulfilled initial promise so as to be able to represent the university's standards in future work and in training and making judgments on younger scholars. These kinds of predictive judgments are difficult to make, but an essential component is the determination that the scholar has produced at least one significant item of mature research. I'm afraid we cannot say this in Professor Dube's case. He has an enormous body of lectures

given to external groups, and has shown promise in two areas of cognitive psychology, intelligence measuring and educational policy. But none of this adds up to a mature contribution. I know for a fact that his chairmen have encouraged him repeatedly to produce such a work.

Aside from tenure considerations,—I'm not sure that Professor Dube ought to seek scholarly maturity. His great contribution will be to write an autobiography, and to extend out from his personal experience. But this is not the kind of contribution that is particularly important for tenure and promotion. In this sense, trying to meet tenure qualifications might be detrimental to his own best career as a writer (of course I understand that his literary career also has to feed his family!).

With regard to teaching, I must look at the situation as dean over the Program in Africana Studies. This is the most important consideration I have here. Students in that program need not only proper respect and affection, and efficient teaching, but also a role model. There is no doubt that Professor Dube is a fine role model as a human being. But as an academic he seems to me not to have made the transition from his extraordinary experience to a disciplined, creative, analytic academic appropriation of that experience. This is shown in the failure to complete a significant and mature research project. Yet the transition from experience to a disciplined academic appropriation of that experience is precisely the goal for our students, particularly for minority students. They need to see, to feel, and to internalize the need for the work of making that transition. More than students at elite universities, Stony Brook students, particularly those in Africana Studies among other units, must focus on the skills of academic thinking and research. They must learn the labor of detail, of balancing opinions from all sides, of plain erudition. By no means do I imply that Professor Dube fails to teach these skills and to demand the labor from his students. What I mean is that giving him tenure signals the students that experience and commitment are enough, that the labor of academic discipline can be foregone if one's experience is sufficiently powerful.

To my mind, Africana studies has not yet fulfilled its potential or accomplished its mission at Stony Brook. It needs greatly to elaborate its relations with other departments to make black studies a presence on campus; that has happened to an appreciable degree *only* in theatre and English. Professor Dube's apparent withdrawal from academic psychology is not helpful. Africana Studies also needs to become a department and develop a graduate program in conjunction with other departments; Professor Dube's scholarly posture would be a hindrance here.

Because the virtue of Professor Dube's historically important experience does not in fact contribute to what is important for tenure, I believe his case in the end turns out to be comparable with the other good teacher-citizens whom we turn down because of a poor publication record. Regarding publications alone—and the teaching and service records are quite comparable—Professor Dube has less work in quantity, and of lesser academic maturity, than the other two in the Division against whom I recommended this year. And so I must recommend against Professor Dube.

In his eloquent summary of the Departmental Committee deliberations, Professor Owens points out that even those recommending non-tenure would like to find some way to keep Professor Dube at the university. I agree with this, both because of his teaching effectiveness and because his experience is an important resources for the study of Africa. If the higher administration concurs with my judgment about non-tenure, I would like to see another scholar, preferably a senior one with administrative ambitions and a first-rate academic publication record hired on his line. And if an extra lecturer line could be added to the unit for Professor Dube, the university would only gain. Or perhaps Professor Dube could be hired on a PR line with some teaching responsibilities to be archivist for the AFS library and video collection, commissioned to record his own experiences.

It might be argued that an appointment with tenure but without promotion would be appropriate, sending the right signal to the students and to Professor Dube while keeping him as a resource. This would be a humane solution for him

as well. But it ultimately would work against Africana Studies, depriving them of a kind of person it greatly needs. Professor Owens is correct that Africana Studies faculty cannot always be judged by traditional categories; the field is a new one and necessarily blurs all sorts of professional distinctions. By the same token, the necessity of displaying disciplined scholarly standards is all the more stringent. To repeat myself, Africana Studies needs scholars who display the means by which they have made the transition from important experience to its intellectual and academic appropriation.

A final personal note. I feel like a heel recommending the denial of tenure to such a solid human being as Professor Dube, one whose experience is rare and valuable and who is so well loved by his colleagues and students. In addition my reaction to outsiders who call me at home in the middle of the night to insist I fire him because he says the wrong things about Zionism, is to find every reason to keep him. I cheered on Professors Baraka and Owens as they pushed Professor Dube to finish his big book, and supplied funds for transcription and typing, but to no avail. Alas, my bottom line is a reluctant but very definite No. Such heel-like qualities go with being a dean.

RCN/ms
Enclosures

STONY BROOK

MEMORANDUM

TO: President John H. Marburger
FROM: Homer A. Neal, Provost
SUBJECT: Tenure and Promotion Case of Professor Ernest Dube
DATE: July 1, 1985

I have carefully considered the recommendations forwarded to me regarding the tenure and promotion of Dr. Ernest F. Dube. The ad hoc committee of faculty established by Dean Neville in accordance with the guidelines of the Arts and Sciences Senate has recommended that Dr. Dube be promoted to the rank of Associate Professor with continuing appointment. The Arts and Sciences Personnel Policy Committee has recommended, in exception to standard practice, that he be granted tenure but not promoted. Dean Neville has recommended that Dr. Dube neither be tenured nor promoted.

The diversity of recommendations reflects the complexity of this case. There is no doubt that Dr. Dube has made a unique contribution to the Africana Studies Program in that his experiences have allowed him to present to students and faculty an original account of the evils of the South African political system. His perspective on this and related topics clearly offers to his students and colleagues a significant educational enrichment and moral reinforcement.

In a University where high standards of scholarship form the primary basis for tenure and promotion, one must ask whether such contributions fit within the definition of scholarly accomplishment. Continuing appointment at a major research university is warranted only when an individual has taken his or her unique experiences, training, background and insights and prodigiously translated them into a form, based on the rigors of scholarly traditions, that can be read and shared by scholars for generations to come. The estab-

lished procedure for doing this in the humanities and social and behavioral sciences is in the publication of articles and books which have been subjected to critical review. As pointed out by Dean Neville, Dr. Dube's publication record is extremely limited. Although he has been very active as a public speaker, he has not produced the kind of scholarship we require of others whom we award continuing appointment or promote.

In view of the above considerations, I have reached the difficult decision to support the recommendation of Dean Neville that Dr. Dube not be promoted nor granted continuing appointment. However, in view of the contributions Dr. Dube could clearly continue to make to higher education, I wish to stress the appropriateness of our University in extending to him every reasonable offer of assistance in finding suitable future employment.

Ex. F. to Marburger Affidavit

STONY BROOK

State University of New York
at Stony Brook
Stony Brook, NY 11794
telephone (516) 246-5940

CERTIFIED MAIL

#P-107-251-224

August 30, 1985

Professor Ernest Dube
523 East Fourteenth Street
Apartment 3-E
New York, New York 10009

Dear Dr. Dube:

I am responding to your letter of August 27 in which you ask for reasons the non-renewal of your contract of which I notified you earlier this month. First, however, I wish to apologize for not sending that notification to your current address. Despite your remark that the address 479 Emerson Street, Apartment 3E, Uniondale does not exist, that is the address currently listed for you in the university directory. Before sending the notice, my office received telephone confirmation from your department that the directory address was valid. That is also the address to which I previously sent correspondence dealing with your official status, and you returned signed copies at that time (see attached).

I wish to encourage you to visit my office to review your evaluation file. Although, in keeping with the provisions of the UUP Agreement, Provost Neal's letter to you of July 3 indicated that the file would be available for five days after you received his letter, I have asked that the file be made continuously available for your inspection. While the following paragraphs respond to your request for reasons, I believe that a perusal of the file will be very helpful in understanding the process that led to my decision.

A reading of the reports from the two faculty review committees shows that they were not unanimous in their recommendations for tenure. The Personnel Policy Committee in particular stated that

"There was general agreement that both the quantity and quality of written scholarship was short of the usual standards. Accordingly there was in our discussion very little support for promotion. Fairness both to other candidates and to the scholarly goals of the University require that we recommend against promotion for the level of scholarly activity reflected by this record.

The minority view of the Personnel Policy Committee was that ". . . the usual standards for written scholarship would be too severely compromised to recommend tenure." While the majority disagreed with their assertion, the chairman reports that

"There was general agreement among the members of the Committee about the facts and issues in this case. The differences between those subscribing to the majority and minority opinions were therefore about the weights that should be assigned to the various criteria . . .".

At the next level of review, Dean Neville analyzed the status of the Africana Studies program, noting particularly its need to develop scholarly strength and interaction with other academic departments. He concluded that the inadequacies in scholarly activity noted by the Personnel Policy Committee should be assigned such weight given these departmental needs that tenure should not be recommended. Provost Neal concurred with this recommendation, but broadened the basis for assigning more weight to scholarly performance from that of departmental needs to the overall standards of the University.

My own conclusion is that the assessment of your performance in the areas of mastery of subject matter, teaching effectiveness, scholarly ability, university service and growth (the

areas enumerated as criteria in the Policies of the Board of Trustees) was carried out by the appropriate faculty committees. The administrative recommendations did not contradict the findings of the faculty committees with respect to performance in these areas, but assigned more weight to scholarship. I agree with that weighting, and therefore supported the recommendation that you not be granted promotion or tenure.

Because I acted last year to delay your evaluation because of "the unprecedented and unusual circumstances which have created an environment which may impair the tenure review process", I would observe now that the reasons for non-renewal of your contract are not related to the incidents which created those "unusual circumstances."

In summary, my decision was based on findings by faculty evaluation committees that indicate shortcomings in the area of scholarship. The shortcomings do not have to do with lack of expertise, but rather with evidence that in the words of Provost Neal, your unique experiences, training, background and insights have not been translated into a form, based on the rigors of scholarly traditions, that can be read and shared by scholars for generations to come.

At every level of review, your value to this campus has been stressed. I wish to thank you for your service under conditions which have been at times extremely difficult for us all, and to express my hope that you will develop your ideas and experiences in more rigorous and permanent forms.

You may request a further review of this decision under Article 33.4 of the Agreement between UUP and the State of New York. If you wish this further review, please follow the procedures described in the Agreement.

Sincerely,

/s/ JOHN H. MARBURGER
John H. Marburger
President

Enclosures
bc: H. A. Neal
Personnel

Ex. F. to Neville Affidavit

STONY BROOK

Human Resources Department
 State University of New York
 at Stony Brook
 Stony Brook, NY 11794-0751
 telephone (516) 632-6145

November 24, 1986

MEMORANDUM

TO: Chancellor Clifton Wharton

FROM: Advisory Committee for Appeal of Ernest F. Dube
 Chairperson: Professor Thomas T. Liao
 Committee Members: Professor Edward Ames
 Professor Dana Bramel

SUBJECT: Committee Report for Appeal of Ernest Dube

This memorandum reviews the tenure and promotion process of Ernest F. Dube, an Assistant Professor in the Africana Studies Program at SUNY/Stony Brook. This review was undertaken following the guidelines provided by Article 33 of the UUP-State Agreement. The committee's report was prepared and written according to the outline provided by Thomas M. Mannix, Associate Vice Chancellor, in his letter October 20, 1976.

1. Description of Review Process

During the months of October and November 1986, the committee reviewed Professor Dube's tenure and promotion file and met five times to discuss the contents of the file and to interview three people to obtain additional information. To obtain a balanced perspective of this case, we interviewed the following people at three of our meetings:

October 23—Professor Ernest F. Dube
 October 30—Professor Aaron Godfrey
 November 6—President John H. Marburger

II. *Appointment Date and Prior Experience*

Professor Dube was appointed to his current position in September, 1977. He received his Ph.D. in Psychology from Cornell University in 1976. His doctoral dissertation was an excellent piece of work. It dealt with the problem of taking cultural differences into account when measuring the "intelligence" of students of widely differing backgrounds, specifically those of African and European students.

III. *Chronology of Tenure and Promotion Review Process*

Since Africana Studies is a "Program" and not a Department, his qualifications for promotion and tenure were initially reviewed (in 1984/85) by a committee specially appointed by the Dean of Humanities. This committee recommended (by vote to 4 to 3) that he be promoted to the rank of Associate Professor and (by a vote of 6 to 1) that he be granted tenure. This decision was then reviewed by the College of Arts and Sciences Personnel Policy Committee. They recommended (by vote of 4 to 3) that he be given tenure at the rank of Assistant Professor. The Dean of Humanities then recommended against Professor Dube's being granted either tenure or promotion. The Provost and the President also decided against tenure or promotion. On appeal, a committee such as ours was appointed in 1985. Its report recommending tenure as Assistant Professor was not acted on by the Chancellor.

Despite the three different recommendations made at the three steps of the review procedure, there is substantial agreement as to the facts in the case. These we may summarize as follows:

A. It is SUNY/Stony Brook policy to consider the accomplishments of candidates for tenure and promotion in the areas of scholarship, teaching, and service, with the first receiving the greatest emphasis.

B. Since the completion of his thesis at Cornell University, Professor Dube's publication record has been below the levels

normally considered adequate for promotion and tenure at SUNY/Stony Brook.

C. Professor Dube has achieved a measure of national recognition as a speaker. For several years, he has spoken about once per month to various gatherings at American universities (including Chicago, Minnesota, and Berkeley). Some of these addresses have been "non-academic," but perhaps one-third have dealt with scholarly topics (unrelated to his dissertation and have been sponsored by university departments of Anthropology, Political Science, Psychology, and Sociology. If these addresses had been written down and published, they might have raised the usual problems faced by scholars pursuing interdisciplinary research, but they would be much more easily appraised than his actual record.

D. Professor Dube's record as an undergraduate classroom teacher has been above average. Not only has he attracted students to his own course, but he has also spent a great deal of time and effort in supervising individual reading and research by undergraduates in the Africana Studies Program. Professor Dube has regularly had a teaching load which is greater than the load which most Stony Brook departments assign to faculty with active research programs.

E. Professor Dube has also been active in helping minority graduate students in Psychology develop and carry out their doctoral dissertation research, even though he has not been assigned teaching duties in the Psychology Department.

F. Professor Dube has achieved a measure of national recognition as one of the few Black scholars to have emerged from South African educational system. This fact would certainly make him a special kind of asset for Stony Brook. He serves on the editorial board of the *African Urban Quarterly* journal. In updating his professional achievements, the committee discovered that Professor Dube has written a paper dealing with racism that has been accepted for publication in the *Philosophical Forum*.

Given this non-controversial statement of the facts of the case, we note that the three levels of review of these records

have reached different recommendations. The difference in tenure and promotion decisions is due to the difference in weight given to Professor Dube's scholarship, teaching and service record. A related factor is the difference in the assessment of the value of Professor Dube's contribution to the Africana Studies Program.

IV. Committee Findings and Recommendation

Professor Dube's file, letters of recommendation and personal interviews show that there is general agreement that he is a valued member of the Africana Studies Program. Besides being an effective teacher, many view him as "a Cultural resource" of the university. The key question is whether his strengths in teaching and service outweigh his weakness in scholarly contributions as measured by published papers. As with other review groups, we are also divided on this point.

In section III(D), we noted that Professor Dube's teaching load has been heavier than normal required at SUNY/Stony Brook. From 1977-83, besides teaching classes and supervising directed reading and projects, he also was chairperson for one year. It can be argued that the demand for his time limited his ability to publish more papers. From 1983-86, the problems that relate to his teaching about racism certainly interfered with his research and writing activities.

Two faculty review committees have recommended that Professor Dube be tenured because of his value to his department and the university. The main reason that some faculty reviewers and central administrators recommended no promotion or tenure was due to his weak publication record. We feel that publication of papers is only one measure of scholarship. Professor Dube has demonstrated scholarship by being invited to give lectures for other scholars at prestigious universities.

In final analysis, Professor Dube's record must be judged against the six criteria for promotion and tenure that are provided by the SUNY Board of Trustees. He certainly has mastery of subject matter and is an effective teacher. These qualities combined with advisement work with students

makes him a valued member of his program. Professor Leslie Owens, former Chairperson of the Africana Studies considers Professor Dube to be a key person in their program. His service record includes being his program's chairperson for one year.

In the area of scholarship, Professor Dube's record should be judged in a broader context. Although he has a weak publication record, his frequent invitations to address scholarly audiences is an indication that what he has to say is considered by many to be very important. Finally, we want to point out that Professor Dube has made significant contributions to enriching the life of the University by helping to correct discrimination and encouraging diversity in his courses.

Our judgment is that Professor Dube is greatly needed by the Africana Studies Program and is a valuable academic resource of our University. Thus we recommend that either:

- (1) Professor Dube receive tenure as an Assistant Professor, or
- (2) Professor Dube's contract be extended for an additional three years (1987-1990). This period of time would be used by him to demonstrate an ability to publish additional papers. During the 1989-1990 academic year, he should be considered for promotion and tenure again.

Ex. H To Wharton Affidavit

CORRECTED COPY

State University of New York
State University Plaza
Albany, New York 12246

Office of the Chancellor

January 30, 1987

Certified Mail

Professor Ernest F. Dube
Apartment 3-E
523 East Fourteenth Street
New York, New York 10009

Dear Professor Dube:

Your case and appeal present a complex and difficult set of issues. I have considered the matter most carefully and wish to share my thoughts and conclusions.

First, it is clear that employing the tenure criteria for teaching, research and public service stipulated by the SUNY Board of Trustees and using the weights assigned to each by the University Center at Stony Brook, they have correctly found you deficient in the area of scholarly publications. While all three elements are involved in each tenure decision on each individual SUNY campus, it is quite clear that research receives a much larger weight on a graduate/research comprehensive university campus than on a four-year arts and science campus, and even less on a two-year community college campus. Your strong record in teaching and in public/community service was not sufficient to offset the deficiency in scholarly publication. This is a conclusion which was made by all parties in the process, including the most recent Chancellor's Advisory Committee.

Second, it is clear that the circumstances surrounding consideration of your tenure and the human environment in which it is taking place is not neutral or purely academic. Although the Stony Brook faculty committee/senate found that you

had acted properly and within your academic rights in the conduct of your teaching, there are segments of the university and wider community who do not agree. Moreover, these extraneous issues—irrelevant to the tenure decision *per se*—will be used both by your critics and defenders to interpret whatever tenure decision is made. If an adverse tenure decision is made, your critics will claim that it is a vindication of their charge of impropriety in your teaching and your advocates will claim that the decision was based upon racial/religious biases. If a positive tenure decision is made, your critics will claim that it represents a reaffirmation of the content of your teaching and your advocates will claim a victory against racial/religious bigotry and for the content of your teaching. In neither case will the true bases of the decision be seen as the traditional ones, that is, the quality of your performance in teaching, research and public service.

I believe that either decision would be detrimental both to you and to the university. If an adverse tenure decision is made, your professional career could be affected by an erroneous and inaccurate perception. If a positive tenure decision is made, the proper weights and basis of a campus judgment on the criteria employed in a tenure decision would be undermined. Stony Brook should be allowed to exercise its judgment that research be given proper weight; you, however, should not be penalized professionally for inaccurate perceptions of such an adverse decision.

I believe that the State University of New York bears some responsibility not to allow these external issues to intrude improperly upon such tenure decisions; we also have a responsibility to provide reasonable protection to our faculty from external excesses which could do damage to their careers.

I have, therefore, concluded that the State University of New York should offer you an opportunity for a continuing appointment at another campus within the system providing that such a campus is willing to do so. The nature of the appointment will be determined by the campus after appro-

priate faculty/departmental review of credentials and personal interviews. In order to facilitate this, the appropriate line and funding would be provided to the campus.

If you wish to pursue the possibility of appointment at one of SUNY's other campuses, you should be in touch with Dr. Joseph Burke, Provost, State University of New York. Dr. Burke would be pleased to have your resume and supporting material sent to any and all of the other SUNY campuses you might be interested in and inform them of the conditions of this letter.

During this period of exploration, your current appointment will be extended through August 31, 1987.

Sincerely,

Clifton R. Wharton, Jr.
Chancellor

cc: SUNY Board of Trustees
President Marburger
Dr. Liao
Dr. Ames
Dr. Bramel
bc: Dr. Burke
Dr. Altes
Dr. Frangos
Dr. Haffner
Mr. Rosenthal
Ms. Villa
Mr. Mannix

**EXCERPT FROM TENURE REVIEW FILE
PREPARED BY ERNEST F. DUBE**

PUBLICATIONS

- "Literacy, Cultural Familiarity, and 'Intelligence' as Determinants of Story Recall, in Ulric Neisser, ed., *Memory Observed, Remembering in Natural Contexts* (San Francisco, W. H. Freeman and Company, 1982) pp. 274-292
- "Reagan's Policy Toward South Africa: Misunderstood or Understood," *New World Review* June/July 1984
- "The Relationship Between Racism and Education in South Africa," *Harvard Educational Review*, March 1985

EMORY UNIVERSITY

Emory Cognition Project

Department of Psychology
Atlanta, Georgia 30322
404 329 7973

February 15, 1985

Dr. Leslie H. Owens
Africana Studies Program
State University of New York
Stony Brook, NY 11794-4340

Dear Dr. Owens:

I admire Fred Dube very much, but I am not well qualified to evaluate his credentials for promotion in the Africana Studies Program. Dube took his degree with me at Cornell in cognitive psychology, and his doctoral dissertation was in that field. It was an excellent piece of work, using very original methods to arrive at an important result. It has been widely cited since 1982, when I reprinted selections from it in my edited volume *Memory Observed: Remembering in Natural Contexts*. Unfortunately (I mean unfortunately for cognitive psychology, it is the only piece of cognitive research Dube has ever done. He did not even prepare the selection for *memory Observed*; I did that with his permission. Dube is clearly not a cognitive psychologist any more, and I cannot reasonably assess his "professional achievements and standing in the fields of Africana Studies/Psychology." There are certainly black cognitive psychologists in America who could be described as being in that field—good ones—but it would make no sense to compare them with Dube.

Dube is doing something quite different. His field of study is *racism*, especially racism in Africa. It is an important field, which certainly should be represented on your faculty. My impression is that Dube represents it well: he is a person of high intelligence and great integrity from whom I have learned a great deal, and from whom students surely learn even more. But it is not *my* field; I would not know who to

compare him with, or how to evaluate his professional work, or how to weigh the excellence of his teaching against the brevity of his list of publications. (Much should probably depend on the merits of the forthcoming piece in *Harvard Educational Review*.) I hope that you will find it possible to recommend tenure for Dr. Dube, but I am not qualified to give you definitive advice.

Sincerely yours,

/s/ ULRIC NEISSER

Ulric Neisser

Woodruff Professor of Psychology

PS You may show this letter to the candidate if your procedures require it.

TRANSCRIPT OF DEPOSITION OF ASSEMBLYMAN
LEWIS J. YEVOLI

September 11, 1987

Yevoli

Q Do you have any idea what month you had the discussion? Was it in 1983, sir?

A Yes, I would say it was

Q Do you have any idea what month it might have been?

Would it have been in October?

A It probably was in October.

Q What did you say to Assemblyman Kremer, and what did he say to you in that meeting?

MR. O'HAIRE: Objection. I'll let him answer.

A Okay. It's impossible to recall the conversation verbatim.

Q Your best recollection.

A To the best of my recollection, I asked him about the point that I had raised with reference to funding. And to the best of my recollection, he informed me that the appropriations to the State University system, whether it be Stony Brook or any other, are made in total. And that there would be no mechanism that he was aware of whereby you could delete funding for a specific course.

MS. WHIPPLE: Assemblyman, I have a brief question.

EXAMINATION BY MS. WHIPPLE:

Q After October of '83, did you become involved in any matter concerning Dr. Dube?

A No. You mean subsequent to the letter?

A Right.

A Everything that was described here now. Beyond that, no.

* * *

TRANSCRIPT OF DEPOSITION OF CARL J. McCALL

September 22, 1987

McCall

A Could I answer that by telling you how I got there? Maybe that will satisfy it.

Q All right.

A The way that I got to visit Stony Brook was, it was brought to my attention, by a member of the governor's staff, Rabbi Israel Moshowitz that there were some problems at Stony Brook and in the community.

Rabbi Moshowitz was somebody with whom I had worked on a number of issues of community conflict, particularly issues involving what we refer to as black-Jewish relations. And since we had worked on other matters of that type, Rabbi Moshowitz called me to ask me if I knew about the situation that was developing at Stony Brook and in the community.

Q Hold it there. Do you recall when, around what time, you received that call?

A The visit was in October. So I would say late September, perhaps a week previous to the visit.

Q All right.

So that we can pin down some dates, I will show you what has been previously marked in Plaintiffs Exhibit 101, a report to the governor for the period ending November 18, 1983 on the New York State Executive Department, Division of Human Rights letterhead, marked for identification, as of this date.)

McCall Testimony Cont'd

Q Sir, I show you what has been marked as P101 for identification and ask you whether or not this report was prepared by you?

A Yes, it was.

Q Turning to item number 4 on page 2 under the title "Local Government and Citizens' Concerns and Reaction to Policies," it says, "Commissioner McCall and Dr. Moshowitz have been meeting with black and Jewish citizens within the community and on the SUNY at Stony Brook campus to ease tensions between black and Jewish people. The commissioner and Dr. Moshowitz are establishing a series of dialogues in an effort to ease tension."

The meetings that you reported on, sir, in the report, Plaintiffs' Exhibit 101, are those the meetings that occurred as a result of the call that you said you received from Rabbi Moshowitz?

A That's true. However, I would like to clarify the record.

When I say these meetings, all of these meetings took place within one day, the one visit to the campus.

Q To the best of your recollection, that took place sometime, you think, in October?

A Late October, that's right. It would have been prior to this report which covered a month's activities. Somewhere within the 30-day period prior to November 18.

Q Do you have any other documentation, sir, which may help to establish when that meeting took place?

A Yes. I have a letter of mine that I think you have of October 25 to Assemblyman Yevoli which mentions that Rabbi Moshowitz and I arranged for a meeting for Thursday, October 27 at Stony Brook.

So I believe that that was the date when we met. Although, that was prior to it, but that would have been the date.

McCall Testimony Cont'd

MS. FRIED: The witness is receiving this communique?

A Yes, he did, that's right.

Q Did you discuss with him the fact that you had received a communique on this same matter?

A I don't remember.

Q In Assembly Yevoli's letter—
withdrawn.

You read the assemblyman's letter, did you not?

A Yes, I did.

Q Did you undertake an investigation consistent with paragraph 3 of the assemblyman's letter.

A No. I did not consider this matter one that could appropriately be investigated under the powers of our office, as I knew them. And my response and my visit was not in the manner of an investigation.

Q In your October 25 letter to the assemblyman, did you so indicate to him that you did not consider the matter to be worthy of an investigation?

A No, I did not.

The other source of information that I had about the event was that I reached out to a gentleman that I knew by the name of Kenneth Anderson who was the NAACP director for Long Island. And in the course of my discussion with him, I learned that he had a relationship and an office, in fact, at Stony Brook.

It was actually through him that I arranged the meeting on the campus with Dr. Marburger, with Professor Dube and others.

* * *

**TRANSCRIPT OF DEPOSITION
OF ASSEMBLYMAN ARTHUR J. KREMER**

— October 5, 1987

Kremer

believe it was by telephone, in which he advised me he was sending a letter to me dealing with this situation at the state university and indicating I should be aware of it because I might receive a press call or I might receive some other inquiries.

Q Did he speak to you in any other detail with respect to the contents of the letter?

A Well, he advised me that the letter made reference to the possibility of state funds being removed or withheld from the State University at Stony Brook.

Q Did you respond to that statement?

A I did.

Q What did you tell him?

A I told Mr. Yevoli I knew of no precedent for the legislature removing funds from a campus or—I told him the state budget was completed for the year, that the 1983, '84 budget was final. That I had no recollection of the legislature ever attempting to take back funds from any agency or unit of that agency. And that while he was making a request, I told him in advance, it has never been our policy, and I don't subscribe to it, either.

Q. Did he respond to your comments, in any way?

A No. He advised me that the letter was coming.

Q Did you receive any other communique, in 1983, either proposing or suggesting legislative action, with respect to this matter?

A From whom?

Q From anyone?

Kremer Testimony Cont'd

A No.

Q Did you interpret the October 7th letter that you received from Assemblyman Yevoli as a proposal for legislative action?

A No.

* * *

Q The letter that you are speaking to in your testimony was the October 18, 1983 letter to President John Marburger?

A Yes, sir.

Q Did you receive a response from President Marburger?

A No, sir.

A Did you have occasion, after October 18, 1983, to speak to President Marburger?

A No.

Q In connection with your October 18th letter?

A No.

* * *

A No. I was not involved. I was not involved in anything thereafter.

Q Let me use a different term. Do you have a present recollection that the issue was finished in 1984 as opposed to October 18, 1983?

* * *

A I know that, that my—the matter I was involved in, in October 1983, in one expressing my opinion with respect to Dr. Dube's teaching, and the issue of financial support, which I said I did not support any efforts to do those things, that that was where I ended in my involvement, direct involvement, or indirect.

I know there was subsequent public discussions with respect to Dr. Dube's tenure. I was not involved with that directly or indirectly.

Kremer Testimony Cont'd

* * *

Q Did there come a time when, to the best of your knowledge, the president issued another statement which you had occasion to review?

A Almost simultaneously with the time that I sent out a letter. If the mail works the way it should work I am sure it arrived 10 days after my statement. He made a public statement, which I found satisfactory.

A STATEMENT ON "THE POLITICS OF RACE"

October 19, 1983

In view of the continuing concern regarding the position of the administration of the State University of New York at Stony Brook with respect to the course "The Politics of Race" taught by Professor Dube, I wish to clarify and reiterate that position so there will be no doubts about it.

The Stony Brook administration, for which I speak officially here, absolutely divorces itself from the views expressed in this course, and from any view that links Zionism with racism or nazism. Furthermore, I personally find such linkages morally abhorrent.

Several events have occurred subsequent to the incident that drew attention to Professor Dube's course that some have interpreted as implying a pattern of antisemitic behavior at Stony Brook. These events are each of them unfortunate, but in my opinion are unrelated to each other and to the course taught by Professor Dube. I have already criticized the publication of a poem entitled, "Godless Jew" in a campus literary magazine as insensitive. I deplore the letter written by the Chair of the Africana Studies Department to its Dean for introducing irrelevant political issues into the sensitive discussion of the handling of the Dube course. Earlier last summer, Polity, the student government organization, acted to cut student fee support of Hillel, an action that, whatever its explanation, resulted in an injustice to Hillel on our campus. I believe our approach to these incidents has been sensitive, fair and effective, and that they are anomalies, not the norm, for our campus.

As the Provost and I have promised, and I now reconfirm, a variety of initiatives have been undertaken to review courses and programs including sensitive material, and to bring to our campus a higher degree of understanding of behavior likely to be offensive to one or another of our constituencies. Among other things, the relationship between published course descriptions and actual course offerings is being reviewed. A new campus-wide program of intensive

review of undergraduate departments, planned over a year ago, is scheduled for implementation during the Spring 1984 semester. *Provost Neal* has appointed the *select faculty committee* described in his statement of September 2, and the committee has begun to meet. It is chaired by *Professor C. N. Yang*, and includes faculty members of great distinction. The Provost has also appointed a committee, *chaired by Dean Neville*, to plan and initiate a series of campus events to increase campus awareness of and sensitivity to the issues which underlie the current controversy. *Dean Neville's committee will include community representatives to ensure that we take advantage of valuable human resources in our region.*

It is clear from the widespread public reaction to our handling of these incidents that we need more positive and closer ties with our community constituencies. To strengthen those ties, I am developing plans for a permanent committee including community members to advise me and my colleagues on such sensitive issues at Stony Brook.

TRANSCRIPT OF DEPOSITION OF ERNEST F. DUBE

July 17, 1987

[19B]

★ ★ ★

Q Do you have any estimate of when you might be prepared to submit the manuscript to a purchaser?

A I don't know but I'm hoping within the next two months.

TRANSCRIPT OF DEPOSITION OF ERNEST F. DUBE

July 20, 1987

[17B]

* * *

Q Did you change the course syllabus after the summer of 1983?

A No, I didn't.

The content of what I was teaching didn't change.

* * *

[22B]

* * *

Q A preliminary question that I'm trying to ask is whether the topic was still discussed at all or were you prevented from discussing the topic of Zionism in your classes?

[23B] A No, I continued to discuss the topic of Zionism.

Q We'll get to the second question. Was the manner in which the topic was discussed by you, in your classes, after the summer of 1983, any different from the way it was presented in the summer of 1983?

A No, I wouldn't think so.

Q It was not changed?

A No.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

United States Constitution

Amendment [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Federal Rules of Civil Procedure

Rule 56. Summary Judgment

* * *

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show

affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

CLIFTON R. WHARTON, JR., ex-Chancellor of the State University of New York, individually and in his official capacity; JOHN MARBURGER, President of the State University of New York at Stony Brook, individually and in his official capacity; HOMER NEAL, Provost of the State University of New York at Stony Brook, individually and in his official capacity; ROBERT NEVILLE, Dean of Humanities and Fine Arts at the State University of New York at Stony Brook, individually and in his official capacity,

Petitioners,

—against—

PROFESSOR ERNEST F. DUBE,

Respondent.

BRIEF IN OPPOSITION

LENNOX S. HINDS
STEVENS, HINDS, and WHITE
116 West 111th Street
New York, New York 10026
(212) 864-4445

*FRANK E. DEALE
Center for Constitutional
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Attorneys for Respondent

**Counsel of Record*

TABLE OF CONTENTS

Table of Authorities	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	6
REASONS FOR DENYING THE WRIT	15
CONCLUSION	46

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Ferguson v. Moore-McCormack Lines,</u> 352 U.S. 518 (1957).....	2
<u>Herdman v. Pennsylvania Railroad Co.,</u> 352 U.S. 518 (1957).....	2
<u>Rogers v. Missouri Pacific Railroad Co.,</u> 352 U.S. 518 (1957).....	2
<u>Siegert v. Gilley,</u> 895 F.2d 797 (D.C. Cir. 1990)..... <u>cert. granted</u> , 59 LW 3288 (U.S. October 16, 1990)	5, 7
<u>Texas v. Mead,</u> 465 U.S. 1041 (1984)	3
<u>United States v. Johnston,</u> 268 U.S. 220 (1925)	3
<u>Webb v. Illinois Central Railroad Co.,</u> 352 U.S. 518 (1957).....	2
 MISCELLANEOUS	
<u>Feeney, Conflicts Involving Federal Law: A Review of Cases Presented to the Supreme Court,</u> 67 F.R.D. 301 (1975)	4
<u>Hart, Forward: The Time Chart of the Justices,</u> 73 Harv. L.Rev. 84, 98 (1959)	2

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1990

CLIFTON R. WHARTON, JR., ex-Chancellor of
the State University of New York ,
individually and in his official capacity;
JOHN MARBURGER, President of the State
University of New York at Stony Brook,
individually and in his official capacity;
HOMER NEAL, Provost of the State University
of New York at Stony Brook, individually and
in his official capacity; ROBERT NEVILLE,
Dean of Humanities and Fine Arts at the
State University of New York at Stony Brook,
individually and in his official capacity,

Petitioners,

-against-

PROFESSOR ERNEST F. DUBE,

Respondent.

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

Preliminary Statement

Thirty-three years ago, Justice Felix
Frankfurter wrote a dissenting opinion in a

consolidated set of cases which has, over time, worked itself into the annals of this Courts's jurisprudence concerning the grant of certiorari. Frankfurter argued that "this Court should not be reviewing decisions in which the sole issue is the sufficiency of the evidence for submission to a jury." See, Rogers v. Missouri Pacific Railroad Co., Webb v. Illinois Central Railroad Co., Herdman v. Pennsylvania Railroad Co., Ferguson v. Moore-McCormack Lines, 352 U.S. 518, 525 (1957). Agreeing with Justice Frankfurter, Professor Henry Hart considered the grant of certiorari to decide such issues as "a grievous frittering away of the judicial resources of a nation." See, Hart, Forward: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 98 (1959).

The Petition for Certiorari, (hereinafter, "Petition") filed in this case is an artfully drafted request to have

this Court review whether respondent submitted sufficient evidence to entitle him to a jury trial. At pp. 28-30 the Petition explicitly states that respondent's evidence "was [not] sufficient to establish a violation of Dube's constitutional rights . . . " See also "Questions Presented" at 2. This Court has held repeatedly, however, that "we do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); Texas v. Mead, 465 U.S. 1041, 1043 (1984) (Stevens, J.).

Petitioners characterize this attempt to seek a review of respondent's evidence below as reflective of a "split among the circuits concerning what standard should be applied when public officials move for summary judgment as to their entitlement to qualified immunity concerning motive based claims." Petition at 23-24.

The Petition, however, does not describe any "split" or "conflict" in the circuits, but rather agreement and lack of clarity.¹ Petitioner's assert that "it is clear from the Second Circuit's decision in this case that that court did not apply Martin's direct evidence test or any other type of heightened standard to respondent's showing, or in any way limit the inferences respondent sought to draw." Pet. at 23. However, this assertion is entitled to little weight since the Second Circuit relied on decisions of this Court and a 900 page record, and obviously felt that, whatever the standard was that had to be

¹Even if a conflict existed, that is hardly sufficient grounds for certiorari to be granted. In a study published in 1975, it was demonstrated that in the 1971 and 1972 Terms of Court, certiorari was denied in 60-65 cases each term despite the existence of a "direct conflict" in all of those cases. See, Feeney, Conflicts Involving Federal Law: A Review of Cases Presented to the Supreme Court, 67 F.R.D. 301, 320 (1975).

met, respondent's proffered evidence was sufficient to entitle him to a jury trial on his First Amendment claims. Pet. at 23a-28a. Petitioners' claim that the Second Circuit did not so hold is no more than a transparent attempt to have this court review the decision of that court to see whether the evidence before it was sufficient to entitle respondent Dube to take his claims to a jury.²

Below, after a brief recital of the facts, respondent shows that the evidence before the Second Circuit was more than sufficient to entitle him to a jury trial of his claims.

²This case is therefore quite different than Siegert v. Gilley, 895 F. 2d 797 (D.C. Cir. 1990) cert. granted, 59 LW 3288, (U.S. October 16, 1990), in which the D.C. Circuit ordered the dismissal of plaintiff's case at the pleading stage without allowance for limited discovery on the issue of unconstitutional motive.

STATEMENT OF THE CASE

Respondent Ernest F. Dube is a native of South Africa. Before coming to the United States, he obtained a diploma from the Hofmyer School of Social Work in Johannesburg, South Africa in 1953, and a B.S. degree in Psychology and Sociology from the University of Natal in Devon, South Africa. (Appendix submitted to the Court of Appeals ("A") at 650-651).

In 1967, respondent was expelled from South Africa.³ He came to the United States and studied cognitive psychology at Cornell University. He was awarded his Ph.D. in that field in 1976, and joined the faculty of the State University of New York at Stony

³Respondent was arrested by the South African government in 1963 for his outspoken opposition to apartheid. He was imprisoned for four years on Robben Island, the notorious prison where South Africa holds political prisoners, and was released only on condition that he leave South Africa.

Brook (hereinafter, "S.U.N.Y.") in 1977.
(Id.)

In the spring of 1983, Dube taught a course at Stony Brook called "The Politics of Race." Respondent had taught this course since the fall of 1981. (A. 300-301). The course was designed to analyze what respondent describes as the "three main forms of racism: overt racism, covert racism, and reactive racism." (A. 356).

A visiting professor at Stony Brook, Selwyn Troen, accused respondent Dube of using this course to propagate an equation between Zionism and racism. Professor Troen made this accusation in a letter which he disseminated to newspapers and to a number of SUNY-Stony Brook administrators and faculty members. (A. 23).

Dean Egon Neuberger referred the letter to the Executive Committee of the Faculty Senate, which made a unanimous determination

that Dr. Dube's handling of the subject of Zionism had been consistent with academic freedom and academic responsibility. (A. 49). The full faculty senate later adopted this finding at a plenary session. (A. 50).

Petitioner Provost Homer Neal issued a statement during the summer which adopted the Senate Executive Committee's position as the University's. (A. 40). This position was in turn adopted by petitioner President Marburger, who issued a statement intended to be the University's final word on the subject. (A. 619; 723).

However, the University administration was quickly made aware that the matter would not be allowed to rest there. Local and national Jewish organizations including the Anti-Defamation League, (hereinafter, "A.D.L."), began to raise a clamor of protest against what was characterized as anti-Semitism on the part of Dr. Dube. (A.

703-722; 892-897). An extremist group, the Jewish Defense Organization, passed out leaflets on the Stony Brook campus demanding that respondent Dube be fired "or else," and threatened colleagues of respondent Dube with physical violence. (A.53). The S.U.N.Y. central administration and the Stony Brook administration received letters from state legislators, from alumni, and from business leaders on Long Island demanding that the University deal with Professor Dube's teachings. (Id.) The question of funding for Stony Brook was explicitly counterposed to the continuing tolerance of Professor Dube's course by at least one legislator. (A. 620-626). On August 31, 1983, Governor Mario Cuomo issued a statement which castigated the Stony Brook faculty and administration for their silence in the presence of anti-semitic teachings. (A. 50). Respondent Dube's wife lost her

job, his home was burglarized, and fearing for the safety of his children, he left his home on Long Island for New York City. (A. 654).

Despite Professor Dube's earnest and repeated denials that he did not endorse the position attributed to him in the news media (A. 699, 53), and his decision to alter the syllabus for the course as a result of the controversy (compare, A. 358 with A. 343-350), there was continuous agitation by those seeking to have the University take action against him.

On October 19, 1983 petitioner Marburger, after having issued a statement exonerating respondent Dube of violating academic freedom, met with representatives of twenty-one Long Island and national Jewish organizations. (A. 52). Following that meeting, petitioner Marburger issued a statement which divorced the University from

the contents of Professor Dube's teachings.
(A. 45).

During the fall and winter of 1983 and the following spring, the A.D.L. and other organizations made clear to university officials that their handling of the Dube controversy was still under scrutiny. (A. 779, 780). In April, 1984, university officials from the central administration and the Stony Brook campus met in New York City. That meeting resulted in a joint statement issued by petitioner Marburger and Rabbi Arthur Seltzer of the A.D.L., and in an agreement by the A.D.L. to keep the lowest possible profile from that point on while the university took care of the problem posed by Dr. Dube's teaching. (A. 772-774; 763e-763h).

In 1985, when Professor Dube was considered for tenure, the ad hoc interdepartmental committee (which

functioned as the equivalent of a departmental committee) recommended him for tenure and promotion and expressed "unanimous agreement that Professor Dube not be lost to Stony Brook." (A. 228). The personnel policy committee recommended him for tenure without promotion, with the majority concluding similarly that "the university would be intellectually poorer without Professor Dube's continuing contributions." (A. 231).

Petitioners Neville and Neal recommended against tenure for Professor Dube. Based on the Neal and Neville recommendations, Petitioner Marburger, the chief focus of the attack on Professor Dube, also decided to deny tenure. (A. 250-255; 265; 259).

Pursuant to the United University Professionals agreement with the State University, Professor Dube was entitled to review of the Stony Brook administration's

decision by a tripartite committee, which would report to the Chancellor, petitioner Clifton Wharton. (A. 646-649). The committee, after reviewing Dr. Dube's qualifications, recommended unanimously that he be granted tenure. (A. 650).

Petitioner Wharton declined to take any action on the committee's recommendation, ostensibly because the American Association of University Professors had urged him to grant tenure to Dr. Dube, and thus compromised the procedure. (A. 701).

A second committee was formed at petitioner Wharton's direction, which also recommended that Dr. Dube receive tenure, or alternatively, that he be given a further opportunity to publish during a three year extension of his contract. (A. 664).

On January 30, 1987, petitioner Wharton rejected these recommendations and informed Dube by letter that he would not be given a

tenured position at Stony Brook, but held out the possibility that respondent could obtain a teaching position elsewhere in the S.U.N.Y. system. In his letter, Petitioner Wharton expressed his concern that if he were to grant Professor Dube tenure at Stony Brook, "your critics will claim that it represents a reaffirmation of the content of your teaching and your advocates will claim a victory against racial/religious bigotry and for the content of your teaching." (A. 672).

On March 9, 1987, in a letter to the President of the American Association of University Professors, Jerome Komisar, then acting Chancellor, declined to reconsider the determination made by petitioner Wharton, claiming that it had been based on the tenure criteria by the S.U.N.Y. Board of Trustees. (A. 791).

Respondent Dube instituted this suit in May of 1987. After some discovery, petitioners filed a motion for summary judgment and judgment on the pleadings in October of that year. In May of 1988, Judge Wexler, to whom this case was initially assigned, granted respondent Dube's motion for recusal. The case was then transferred to Judge Mishler, who denied petitioners' motion in October, 1988. Petitioners filed a notice of appeal in November 1988, and the 2d Circuit opinion affirming Judge Mishler was issued on April 12, 1990. Rehearing was denied on June 15, 1990.

REASONS FOR DENYING THE WRIT

The U. S. Court of Appeals for the 2d Cir. concluded after review of the 900 page record in this matter that "Dube has proffered evidence from which a jury could find that petitioners denied tenure and promotion to him in response to pressure

exerted by government officials and community activists outraged by his teachings." Petition for Certiorari at 25a. The evidence relied upon by the Court of Appeals included the following facts:

In his January 30, 1987 letter to respondent conveying the final decision denying tenure, petitioner Wharton wrote: "[i]f a positive tenure decision is made, your critics will claim that it represents a reaffirmation of the content of your teaching and your advocates will claim a victory against racial/religious bigotry and for the content of your teaching." (A. 672).

After the first Chancellor's review committee unanimously recommended tenure for Professor Dube, petitioner Wharton took the unprecedented step of dissolving the committee without acting on its recommendation. (A. 701). Petitioner

Wharton's action was in clear violation of Article 33 of the S.U.N.Y. contract with the Union of University Professionals. (A. 645-649). Petitioner Wharton's most important reason for dissolving the review committee, without acting on its findings, was the fact that he received a letter from a "rival bargaining unit" while respondent's case was under consideration. However, the American Association of University Professors, the organization in question, was in fact an organization with a long tradition of expressing interest in affairs affecting academic freedom and not merely a bargaining unit, and this fact was pointed out to petitioner Wharton by petitioner Marburger. (A. 216).

Petitioner Wharton announced that the first advisory committee was compromised by the release to the press of its recommendation and that he was forming a new

committee. He took this unusual position shortly after a letter was sent from the Long Island Region of the A.D.L. urging that he do so. (A. 722). The A.D.L. had played a leading role in bringing pressure on the university in 1983 to censure Professor Dube. Petitioner Wharton also took the unprecedented step of reporting to the chairman of the Board of Trustees of S.U.N.Y. his decision to deny tenure to Professor Dube. (A. 807).

Petitioner Wharton waited until the eve of his departure from S.U.N.Y. to announce his decision denying Prof. Dube tenure at Stony Brook. (A. 732).

At the same time that he denied Professor Dube an opportunity to continue teaching at S.U.N.Y. - Stony Brook, where he had been the center of a controversy, petitioner Wharton offered him a salary line and a teaching position at any other campus in the S.U.N.Y.

system where Dube could find a position.
(A. 672).

Petitioner Wharton's denial of tenure to respondent overruled the unanimous recommendations of two of the Chancellor's advisory committees, as well as recommendations of two other peer review committees which supported tenure for Prof. Dube.

It is clear from the documentary and testimonial evidence in this case that the S.U.N.Y. central administration and Board became intimately involved in the "Dube controversy" almost from its inception. Moreover, it can reasonably be inferred from the evidence that the S.U.N.Y. central administration was part of a joint effort to abate what it perceived to be, and what petitioner Marburger explicitly referred to as a "conflagration." (A. 724).

The petitioners were party to, or at the very least aware of, a plan which involved implicit assurances to Jewish organizations lobbying S.U.N.Y. that the University would rid itself of the problem presented by Prof. Dube.

Between 1983 and 1985, petitioners met three or four times with Rabbi Arthur Seltzer of the Anti-Defamation League of B'nai B'rith (A. 758). Rabbi Seltzer's position was that Dr. Dube's teachings were anti-semitic and were far beyond the boundaries of academic investigation. (A. 763a-763b). At the first of these meetings, held in Albany, Rabbi Seltzer asserted that petitioner Marburger had made commitments at a previous meeting to expand community involvement in issues of academic freedom but Seltzer complained of the pace with which this commitment was being fulfilled. (A. 769-770). After a second meeting in

Albany, a meeting was held in New York City, which was also attended by Herbert Gordon and petitioner Marburger. This last meeting, in April, 1984, resulted in an agreement or understanding between the university representative and the A.D.L. The substance of this agreement was that the university would deal with A.D.L.'s concerns through its own internal mechanisms and that the A.D.L. would keep the lowest possible profile. (A. 763e-763h).

This agreement was reached after the Governor and a number of state legislators had communicated publicly and privately their concerns about teachings attributed to Dr. Dube. (A-768; 765-767; 620-626). During the same period, the S.U.N.Y. central administration was attempting to influence the governor and legislature to restore cuts to the S.U.N.Y. budget. One of the legislators who had been critical of the

university's failure to censure Dr. Dube was Assembly member Arthur Kremer, who, as chair of the Ways and Means Committee, had been highly supportive of the university. (A. 622; 738).

The meetings between the university representatives and Rabbi Seltzer, were initiated and attended by State Senator Norman Levy, who also chaired the State Senate Task Force on Vandalism, Religious Desecration and Other Acts of Bigotry. (A. 772). This committee was concerned about whether the State of New York should be spending money on such a course. (A. 753)

On August 30, 1983, the governor of New York denounced the Stony Brook faculty and administration for their failure to repudiate Dr. Dube and the views which were being attributed to him. (A. 50). The next day, at a meeting of the S.U.N.Y. Board of Trustees, petitioner Wharton and Board

Chairman, Donald Blinken, presented to the Board of Trustees a proposed press release, which sought to minimize the significance of the Faculty Senate Executive Committee's inquiry and vindication of Dr. Dube. The press release noted that the action had been taken "in mid-August and therefore in the absence of most of the Stony Brook faculty" and that "it in no way intended to condone or provide support for the content of the faculty member's remarks," which were characterized as a "reprehensible distortion of reality." (A. 679). The minutes of the same meeting of the Board of Trustees reflect that Chairman Blinken was at the time or afterward engaged in negotiations with the Governor's office concerning the dates on which cuts in S.U.N.Y. personnel were to take effect. (A. 787).

In the months that followed, Chairman Blinken raised questions about the academic

value of the African Studies Program at Stony Brook. (A. 697).

During the fall of 1983, the university became the focus of protests, inquiries, and investigations, which demanded that the University account for Prof. Dube and the content of his course on the politics of race. On September 6, 1983, petitioner Marburger issued a statement which was to have been the University's official statement on the controversy. (A. 619; 723).

The September 6th statement was criticized by the A.D.L. in a statement released to the press on September 16, 1983, because it failed to acknowledge "the clear conclusion to be drawn from Dr. Dube's course materials' that racist, anti-Semitic advocacy rather than pedagogy, is the central issue." (A. 703). President Marburger felt that he was in danger of being permanently branded as an anti-Semite.

(A. 725). In a letter to petitioner Marburger dated October 7, 1987, New York State Assembly member Lewis Yevoli stated that he was asking the Chair of the Assembly Ways and Means Committee, Hon. Arthur Kremer, to explore the possibility of defunding African Studies at Stony Brook. Assemblyman Yevoli also stated that he was requesting that Hon. Carl McCall, the New York State Commissioner of Human Rights, investigate whether there had been any violation of the New York State Human Rights law at Stony Brook. (A. 620).

In a letter dated Oct. 18, 1983, Assembly member Kremer wrote to petitioner Marburger, stating that the university had not done enough to disassociate itself from Prof. Dube, and urging that a committee be appointed to examine the racial, ethnic and religious content of courses at Stony Brook. (A. 622). Hon. Carl McCall visited the

S.U.N.Y.-Stony Brook campus in October, 1983. (A. 771).

On October 19, 1983, petitioner Marburger met with representatives of twenty-one local and national Jewish organizations. (A. 706; 798). Following that meeting, petitioner Marburger issued a second statement on the controversy surrounding Dr. Dube's course. This statement absolutely divorced the Stony Brook administration from "the views expressed in [Dr. Dube's] course." (A. 45).

During the fall of 1983, S.U.N.Y. administrators received correspondence from State Senator Leonard Stavisky (A. 625), and State Senator Donald Halperin (A. 626). State Senator Norman Levy's Task Force on Vandalism, Religious Desecration, and Other Acts of Bigotry opened an inquiry of the events at Stony Brook, and heard testimony from both S.U.N.Y. officials in Albany and

members of the Stony Brook administration.
(A. 756-763).

On November 21, 1983, petitioner Marburger issued a statement in which he criticized the Faculty Senate for not conducting a more thorough inquiry of the contents of Professor Dube's course. (A. 50).

In a letter dated October 17, 1983, Congressman Raymond McGrath, wrote to petitioner Marburger, stating his belief that "when the excuse of free thought is used to protect the promotion of hateful ideas, the tenet itself becomes a farce," and that "a university classroom is a most improper forum for any individual to air personal opinions when they infringe upon the freedom and well being of others." (A. 892).

On December 3, 1983, State Senators Donald Halperin and James Lack visited the

Stony Brook campus to meet with petitioners Marburger, Neal and Neville, and with senior faculty members who had been critical of Prof. Dube. (A. 709).

Although petitioner Marburger has since stated that he regarded Prof. Dube as his own best advocate (A. 725), there is no evidence that between the summers of 1983 and 1984, when he was spending "hundreds of hours" addressing the community groups and meeting with community representatives concerning the controversy surrounding Prof. Dube, that he urged any of these groups or individuals to meet directly with Prof. Dube.

Petitioner Marburger testified that "the impression that the community had of what was going on in Professor Dube's course appeared to be very different from what actually went on in the course." (A. 726). Petitioner Marburger also testified that

"while there is no question there were parts of the Jewish community and some people such as Rabbi Arthur Seltzer who were very interested in seeing the University disassociate itself from certain concepts, it was by no means clear to me that those were the concepts that Professor Dube discussed in his course." (A. 726-727).

However, there is nothing which suggests that petitioner Marburger ever attempted to clarify the facts concerning Professor Dube's course in his discussions with the complaining community groups. Rabbi Arthur Seltzer testified that petitioner Marburger never suggested to him that he (Seltzer) was incorrect in his perception of Professor Dube's teaching. (A. 763b).

In responding to the "conflagration," as he characterized it (A. 724), petitioner Marburger turned to his provost, petitioner Neal, and to petitioner Neville, who was

Dean of Humanities and Fine Arts, and who became the dean of Africana Studies in the fall of 1983.

A commission was set up by the University to address the problem of academic freedom as it related to responsible teaching of sensitive and controversial subjects. This extraordinary commission was to establish a procedural mechanism to investigate and respond to charges of academic irresponsibility or violations of the concepts that were imbedded in the policies of the S.U.N.Y. Board of Trustees. (A. 728-730).

At the same time, petitioner Neville chaired a commission which was to organize and promote a campus dialogue on the sensitive issues of racism and anti-Semitism. (A. 26).

Thus, the Stony Brook officials who were directly in the eye of the storm, dealing

with the controversy in 1983 and 1984, were the same individuals who rejected Professor Dube as a tenure candidate in 1985 and 1986. Clearly, these individuals were aware that the same organizations which had led the 1983-84 campaign were continuing to monitor the actions on the Stony Brook campus actions concerning Professor Dube and his course.

In the spring of 1984, the American Jewish Committee forwarded to petitioner Marburger the names of two nominees to a Stony Brook Regional Relations Advisory Council which Marburger was establishing. (A. 775). Dr. Myron Cronitz represented the A.D.L. on that council. (A. 763c).

Rabbi Seltzer of the A.D.L. contacted petitioner Marburger during 1984 to obtain an update on how the University was proceeding on its review of Professor Dube's teaching. (A. 763d). Rabbi Seltzer

telephoned petitioner Marburger in 1984 to ascertain whether the contents of African Studies 319, "The Politics of Race," was the same or different. (A. 763f). Rabbi Seltzer also testified to having had a further meeting with the Stony Brook administration in 1984, to discuss the A.D.L.'s position in light of demonstrations on the Stony Brook campus, and stressed that their "concern with the initial problems that had raised the controversy were still there," but that they "would, under no circumstances, go public again." (A. 763h). Implicit in Rabbi Seltzer's deposition testimony is the concern that the A.D.L. sought to counterbalance the effect of demonstrations by demanding that Professor Dube and his course not be singled out "as an object of potential necessary review." (A. 763h-763i).

Again, while Professor Dube was undergoing tenure review, on August 5, 1985 Rabbi Seltzer wrote to petitioner Marburger to alert him to an interview with Dube which was published in what Seltzer characterized as a "PLO publication." (A. 763i-763j). Also during 1985, the American Jewish Congress' Long Island Council published for distribution on the Stony Brook campus, a document entitled "AFS 319 Supplementary Course Materials," which denounced Professor Dube for "irresponsible anti-Zionist rhetoric." (A. 714).

In mid-1985, when Professor Dube was considered for tenure at Stony Brook, an interdepartmental committee consisting of African Studies Program faculty, and faculty members from other social science disciplines, recommended that Dr. Dube be granted tenure. The committee also recommended that he be promoted to associate

professor. The committee found Dr. Dube to be "an exciting, valuable, and not replaceable resource to African Studies, students, and the University community," and noted that:

[a]ll members of the review committee commented favorably as did several outside referees, on his writing samples and the freshness of their insight and contribution to learning in psychology, African Studies and diplomacy. (A. 627).

Following the peer evaluation process, the reports of the interdepartmental committee and the personnel policy committee, which also recommended tenure for respondent Dube, were transmitted through the Dean of Humanities and Fine Arts, and the Provost, to the President of Stony Brook. The Dean and Provost recommended against tenure, and the President made a

decision to deny tenure to Dr. Dube.
(A. 635-643).

Under Article 33 of the contract between the United University Professors and the State University, tenure decisions may be appealed to the Chancellor of the State University. When an appeal is taken, the professor and the college president select an equal number of members of a review committee, and these in turn select a committee chair. (A. 646-647). In the instant case, Dr. Dube named Dr. Leslie Owens, the chairman of African Studies to the committee. Petitioner Marburger selected Professor Elof A. Carlson, distinguished Professor of Biochemistry. These two appointees then named Professor Aaron W. Godfrey, Lecturer in Classics and

Comparative Literature, to chair the committee. This committee made an independent review of Dr. Dube's qualifications, and unanimously recommended to the Chancellor that Dr. Dube be granted tenure. (A. 650).

Under the policies of the Board of Trustees of S.U.N.Y., evaluations of professors, including tenure evaluations, should be based on "mastery of subject matter," "effectiveness in teaching," "scholarly ability," "effectiveness of university service," and "continuing growth." (A. 670).

The Article 33 committee report described Dr. Dube as "a good teacher, [who] gives a great deal of himself to students on an informal basis, as an advisor, and in

directing independent study and readings." Regarding his mastery of his subject matter, the committee discussed Dr. Dube's ongoing scholarly project on race and racism, and noted that he had inquiries from Columbia University Press concerning the project, and also pointed out that Dr. Dube had served as "a consultant for colleagues in the Department of Psychology who are interested in the application of cognitive psychology to differences in achievement, talent, pace of learning and intelligence." Moreover, the Committee pointed out Dube's "profound influence on his colleagues in the African Studies Program." (A. 653-654).

With respect to Dr. Dube's scholarly ability and continuing

growth, the committee took note of petitioner Neville's admiration for Dr. Dube as a "cultural resource;" the Dean's statement that "few people in the Western world have been involved as he in the affairs of Africa;" and to Dean Neville's references to Dr. Dube as "a walking library and video collection" and "a national treasure." (A. 656). The committee commented:

These are not the remarks one would make of a weak candidate for promotion and tenure. Those candidates who are turned down usually lack national, let alone international, stature. Such candidates are not known for their efforts to shape a more scholarly program or department. They are rarely called upon to give invited talks or asked to participate in international conferences. In Professor Dube's case, we argue, those less tangible contributions, not measured by formal publication, are a valid component of the scholarly contributions a faculty member makes in and

outside the institution. (A. 656).

Concerning Dr. Dube's service to the University, the committee pointed to Dr. Dube's efforts to improve the academic standards of the African Studies Program, and his contribution in helping students perform in accordance with their academic abilities, and in producing courses on African history, African politics, contemporary Africa, and racism. The committee noted that at the time Dr. Dube began with the African Studies Program, "it was not considered a serious discipline and had dubious academic standards." The committee recognized Dr. Dube's accomplishment in changing the image of African Studies through the courses he developed and the initiation of independent reading courses. The

Committee noted that these efforts had increased the range of students participating in African Studies courses as well as the quality of minority students in the program. (A. 656).

The committee also noted that "the controversy surrounding Dr. Dube was, in our view, an important factor for us to consider in the development of his academic career" because "it is not easy for one who has been the victim of oppression in South Africa to ignore the potential for violence and intimidation even in our own country..". The committee pointed out that Dr. Dube had been required to do "a considerable amount of academic retooling" to meet the needs of African Studies, and that the fact that African Studies was an

undergraduate degree-granting unit with no graduate degree program made it difficult to do post-graduate work. The committee expressed confidence that once the anxiety of tenure was removed, Dr. Dube could be more productive as a writer while continuing his impressive record of external lecturing and of teaching and service to the university and its students. (A. 657).

The second Article 33 committee, consisting of Professor Dana Bramel, selected by Dr. Dube; Professor Edward Ames, selected by President Marburger; and chaired by Professor Thomas T. Liao, met during the months of October and November, 1986. The committee report noted that Dr. Dube had published a third scholarly article in "The Philosophical

Review." Like the first three peer committees which had reviewed Dr. Dube's qualifications, this committee recommended that Dr. Dube be granted tenure. Like the first tripartite committee, the second tripartite committee was unanimous in its recommendation. The second committee proposed to the chancellor that if he found Dr. Dube's record of publications inadequate, in the alternative his contract should be extended three years, to allow him a period free of turmoil to show his ability to publish. (A. 668).

In addition to the support for tenure of the four peer review committees which evaluated Professor Dube's candidacy, the university was urged to grant Professor Dube tenure by Dr. Thomas Karis, the executive

officer of the City University of New York Ph.D. program in Political Science. Dr. Karis's letter urged tenure for Professor Dube in the strongest terms. Dr. Karis described his own extensive background as a professional and as a scholar in the area of South African politics, and stated of Professor Dube, that "[a] scholar with his experience has a professional obligation to engage in vigorous discussions of the ramifications of his specialty and its implications for policy." Dr. Karis further praised Professor Dube for "the range of his interests and, more important, the underlying coherence." (A. 694)

Professor Dana Bramel impressed upon the university the significance

of Dr. Dube's scholarship as a psychologist. (A. 662).

Professor Michael Zweig, writing in his capacity as President of the Arts and Sciences Senate, warned that the flouting of the peer review process in Professor Dube's case would destroy S.U.N.Y.-Stony Brook's credibility as a home for Black scholars. (A. 659).

The African Studies Advisory Committee's Chair, Professor John A. Williams, warned that denial of tenure to Professor Dube would be a crippling blow to the African Studies Program. (A. 660).

In view of the extraordinary tension which the university had experienced in 1983 and 1984, the university's response to this pressure, and the strength of the

recommendations for Dr. Dube made by his peers within African Studies throughout the review process, and by his colleagues within and outside the university, there is certainly evidence from which a jury could reasonably discredit petitioners' self-serving claims that their decision to deny tenure to Professor Dube was motivated by his lack of scholarship.

The above facts have been culled from a 900 page record which was before the Second Circuit and surely demonstrate that the Circuit Court's conclusion that the evidence submitted was sufficient to get to a jury was proper.

The Second Circuit also properly found that the right which Dube alleged was violated was "long standing and clearly established" under First Amendment law. Pet. at 27a. This conclusion was reached after a discussion of the relevant cases as decided by this Court dating back to 1957. Again, the Second Circuit opinion is consistent with the qualified immunity analysis propounded by this Court and should be upheld.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for certiorari.

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NOV 20 1990

JOSEPH F. SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

CLIFTON R. WHARTON, JR., ex-Chancellor of the State University of New York, individually and in his official capacity; JOHN MARBURGER, President of the State University of New York at Stony Brook, individually and in his official capacity; HOMER NEAL, Provost of the State University of New York at Stony Brook, individually and in his official capacity; ROBERT NEVILLE, Dean of Humanities and Fine Arts at the State University of New York at Stony Brook, individually and in his official capacity,

Petitioners,

—against—

PROFESSOR ERNEST F. DUBE,

Respondent.

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
POINT I THIS COURT'S DETERMINATION TO GRANT CERTIORARI IN <i>SIEGERT V.</i> <i>GILLEY</i> ESTABLISHES THE IMPOR- TANCE OF THE HEIGHTENED STAND- DARD ISSUE.....	2
POINT II THE SECOND CIRCUIT DID NOT APPLY A HEIGHTENED STANDARD HERE.....	4
Conclusion.....	6

TABLE OF AUTHORITIES

Cases	PAGE
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987).....	3
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	4
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	3
<i>Martin v. D.C. Metropolitan Police Department</i> , 812 F.2d 1425, <i>partially vacated en banc and rehearing granted</i> , 817 F.2d 144, <i>reinstated en banc and rehearing denied sub nom. Bartlett on behalf of Neuman v. Bowen</i> , 824 F.2d 1240 (D.C. Cir. 1987).....	2, 4-5
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	4-5
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985).....	3
<i>Siegert v. Gilley</i> , 895 F.2d 797 (D.C. Cir.), <i>cert. granted</i> , 111 S. Ct. 292 (1990) (No. 90-96)	1-4
<i>Whitacre v. Davey</i> , 890 F.2d 1168 (D.C. Cir. 1989), <i>cert. denied</i> , 110 S. Ct. 3301 (1990).....	2 n.1
Rules	
Rule 8(a)(2), Fed. R. Civ. P.	3
Miscellaneous	
“Qualified Immunity for Civil Rights Violations: Refining the Standard,” 75 Cornell L. Rev. 462 (1990)	3-4
Stern, Gressman & Shapiro, <i>Supreme Court Practice</i> (6th ed. 1986).....	2-3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-549

CLIFTON R. WHARTON, JR., ex-Chancellor of the State University of New York, individually and in his official capacity; JOHN MARBURGER, President of the State University of New York at Stony Brook, individually and in his official capacity; HOMER NEAL, Provost of the State University of New York at Stony Brook, individually and in his official capacity; ROBERT NEVILLE, Dean of Humanities and Fine Arts at the State University of New York at Stony Brook, individually and in his official capacity,

Petitioners,

—against—

PROFESSOR ERNEST F. DUBE,

Respondent.

REPLY BRIEF FOR PETITIONERS

In their petition for a writ of certiorari, petitioners established (i) that the District of Columbia and other circuits have applied a heightened pleading and evidentiary standard to plaintiffs opposing pre-trial dismissal on qualified immunity grounds of motive-based constitutional claims; and (ii) that the court below had declined to apply this test and adhered to traditional summary judgment standards. After the petition was filed, the Court granted certiorari in *Siebert v. Gilley*, 895 F.2d 797 (D.C. Cir.), *cert. granted*, 111 S. Ct.

292 (1990) (No. 90-96), a case in which the plaintiff below has challenged the District of Columbia's heightened standard in the context of a defendant's motion to dismiss the complaint.

Faced with the indisputable importance of the issue this petition presents and the Second Circuit's failure to apply the heightened standard adopted by other courts of appeals, respondent now attempts to avoid review by this Court by dismissing *Siebert* as inapposite and mischaracterizing petitioners' position as a mere argument as to the sufficiency of respondent's evidence. In order to refocus the argument on the real issue—what standard plaintiffs must meet when public official defendants move for summary judgment on the basis of their qualified immunity—petitioners respectfully submit this brief in reply to respondent's Brief in Opposition and in further support of their petition for a writ of certiorari.

POINT I

THIS COURT'S DETERMINATION TO GRANT CERTIORARI IN *SIEBERT V. GILLEY* ESTABLISHES THE IMPORTANCE OF THE HEIGHTENED STANDARD ISSUE.

In *Siebert v. Gilley*, 895 F.2d 797 (D.C. Cir.), *cert. granted*, 111 S. Ct. 292 (1990) (No. 90-96), the District of Columbia Circuit dismissed a claim premised on unconstitutional motivation pursuant to the heightened standard adopted in *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, *partially vacated en banc and rehearing granted*, 817 F.2d 144, *reinstated en banc and rehearing denied sub nom. Bartlett on behalf of Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987),¹ discussed at length in the petition here. After this petition was filed, this Court granted certiorari in *Siebert*. As noted in Stern, Gressman & Shapiro,

¹ *Martin* was applied at the pleading stage in *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 3301 (1990).

Supreme Court Practice (6th ed. 1986) at 221, "[w]here the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari had been granted, the issue is obviously important"

Respondent seeks to dismiss the significance of the heightened standard issue by suggesting (Brief in Opposition at 5 n.2) that the sole question presented in *Siebert* is whether trial courts must permit some limited discovery before dismissing pursuant to the heightened standard. The *Siebert* petition, however, cannot be read so narrowly. *Siebert* argues, *inter alia*, that the heightened standard adopted by the D.C. Circuit conflicts with the pleading standard set forth in Rule 8(a)(2) of the Federal Rules of Civil Procedure as well as the qualified immunity doctrine articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); and *Anderson v. Creighton*, 483 U.S. 635 (1987). Petition for Writ of Certiorari in *Siebert v. Gilley* at 18-22. Although the preclusion of discovery as to the issue of motivation is one aspect of the D.C. Circuit's standard, petitioner *Siebert* has clearly challenged the standard *in toto* and not merely that feature. Moreover, the discovery issue and the appropriateness of the standard itself are inextricably bound. It would be difficult for the Court to pass upon the necessity of permitting discovery as to motive before dismissing under that heightened standard, without simultaneously approving or rejecting that standard itself, either explicitly or implicitly.

Even if the issue in *Siebert* could be narrowed as respondent suggests, granting certiorari here would simply become *more* important. Petitioners have established that the Second Circuit has not adopted the standard embraced by the D.C. Circuit, or the variation on that test adopted by other courts of appeals. Thus, deciding only the discovery issue, while leaving the standard itself unreviewed, would prolong an existing conflict as to the proper application of an important doctrine. As noted recently, "[a] statement by the Court on these issues is necessary . . . to end the confusion among the circuits, and to lead to a more uniform application of the

qualified immunity standard to these [motive-based] types of cases." "Qualified Immunity for Civil Rights Violations: Refining the Standard," 75 Cornell L. Rev. 462, 483 n. 156 (1990).

Granting certiorari here, as well as in *Siegert*, has the advantage of providing the Court the opportunity to address the issue comprehensively. It can consider, in particular, the appropriateness of the test set forth in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), as an alternative to the test already adopted by the D.C. Circuit. Once the Court resolves all the issues in both of these cases, the lower courts will have the clear framework for applying qualified immunity doctrine to motive-based claims that they have lacked to date.

POINT II

THE SECOND CIRCUIT DID NOT APPLY A HEIGHTENED STANDARD HERE.

As noted in the petition, the court of appeals was required to measure the evidence through the "prism" of the appropriate substantive evidentiary burden in reviewing the district court's decision on petitioners' summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). The Second Circuit, as demonstrated by its discussion of summary judgment and the authorities upon which it relied, applied the traditional standard rather than the heightened standard other circuits have held is appropriate when qualified immunity as to a motive-based claim is at issue. The court relied solely on the inferences it held could be drawn from respondent's circumstantial evidence concerning the public controversy. This evidence was not sufficient to meet the *Martin* test and would also fail to meet the *Matsushita* standard.

By resort to a lengthy recitation of the circumstantial evidence concerning the controversy allegedly relied upon by the

court (Brief in Opposition at 15-46)², respondent seeks to deflect attention from his failure to adduce evidence as to the respective motives of the individual petitioners which would suffice under *Martin* or *Matsushita*—direct evidence of an improper motive or evidence tending to exclude petitioners' explanations for their tenure recommendations or decisions, e.g., evidence showing (i) that petitioners granted tenure at Stony Brook to others with less substantial scholarship or (ii) that petitioners denied tenure to other controversial candidates even when their scholarly accomplishments were markedly superior to candidates awarded tenure. Moreover, respondent declines to address the merits of applying either *Martin* or *Matsushita* here, failing to even cite either case.

Instead, respondent resorts to the argument that the Second Circuit "obviously felt that, whatever the standard was . . . , respondent's proffered evidence was sufficient" Brief in Opposition at 4-5. This contention, however, is neither supported nor implied by any statement in the Second Circuit's opinion.

Respondent has failed to rebut the central thesis of the petition—that there is a conflict among the circuits as to an important question of law. Because the Second Circuit declined to apply either *Martin* or *Matsushita* and because respondent would have failed to meet either test had the circuit applied it, this case provides an ideal vehicle for determining whether a heightened standard is appropriate, and whether *Matsushita* provides the best formulation for such a standard. Given the importance of the question, the petition should be granted.

2 The recitation is misleading. Contrary to the impression left by that description, the only items specifically referred to by the Court were Marburger's October 19, 1983 statement, Wharton's January 30, 1987 letter and "the public protests and threats to defund Stony Brook programs." Appendix to Petition at 25a.

CONCLUSION

FOR THE REASONS STATED HEREIN AND IN THE
PETITION FOR A WRIT OF CERTIORARI, THE
PETITION SHOULD BE GRANTED.

Dated: New York, New York
November 19, 1990

Respectfully submitted,

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(4)

No. 90-549

FEB 1 1991

JOSEPH E. SPANIOLO
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1990

CLIFTON R. WHARTON, JR., ETC., ET AL., PETITIONERS

v.

ERNEST F. DUBE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in this action under 42 U.S.C. 1983 based on state officials' alleged improper motivation in denying tenure to a university professor, plaintiff made a sufficient showing to defeat defendants' motion for summary judgment on the ground of qualified immunity.



TABLE OF CONTENTS

	Page
Statement	1
Discussion	12
Conclusion	14

TABLE OF AUTHORITIES

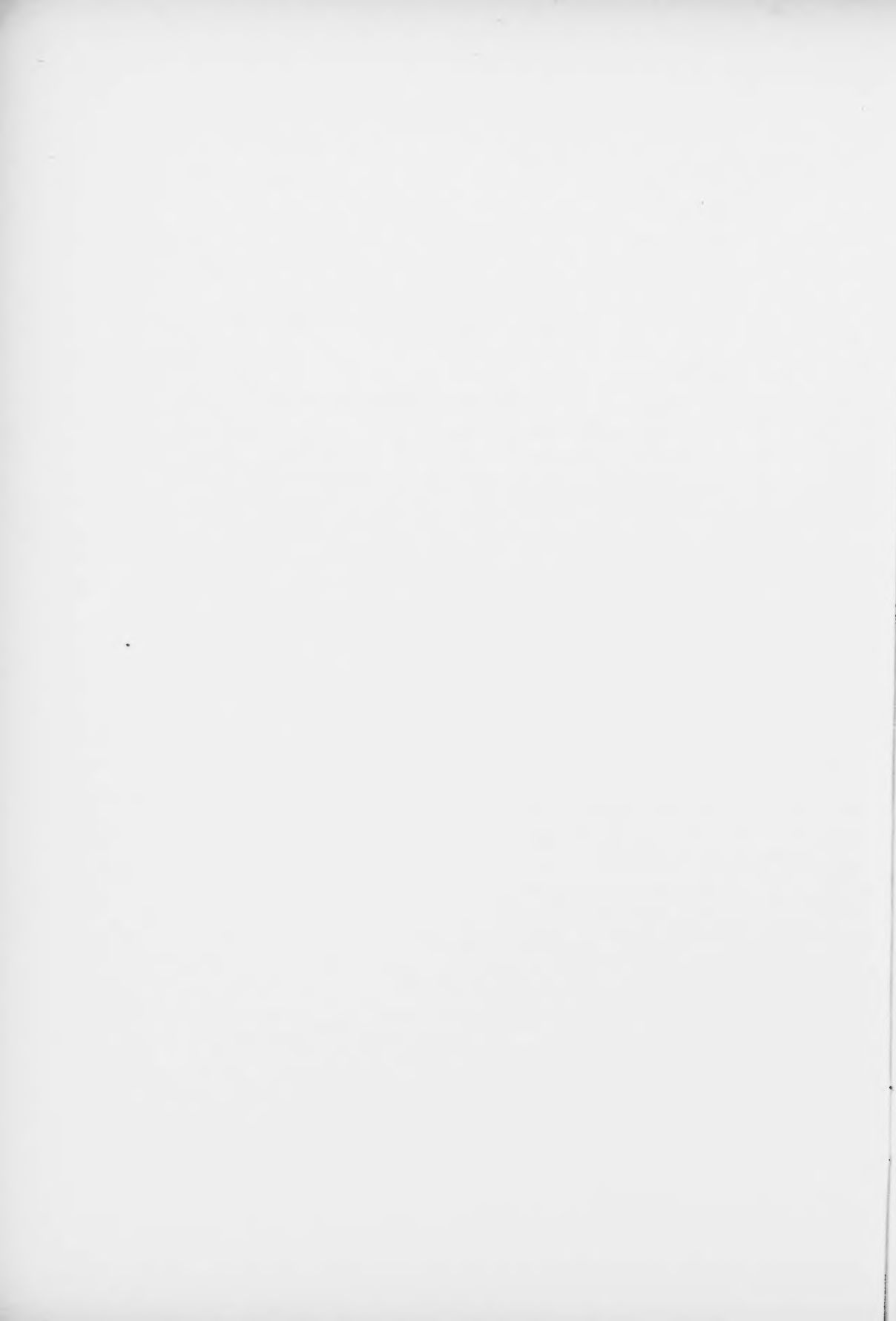
Cases:

<i>Bivens v. Six Unknown Named Narcotics Agents</i> , 403 U.S. 388 (1971)	12
<i>Butz v. Economou</i> , 438 U.S. 478 (1978)	12
<i>Contemporary Mission, Inc. v. United States Postal Service</i> , 648 F.2d 97 (2d Cir. 1981)	13
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	12
<i>Siegert v. Gilley</i> , cert. granted, 111 S. Ct. 292 (1990)	12, 14

Constitution, statute, and rule:

U.S. Const.:

Amend. I	9, 10
Amend. XI	9
Amend. XIV	9
42 U.S.C. 1983	9, 12
S.D. N.Y. Civ. R. 3(g)	10



In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-549

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ERNEST F. DUBE

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. In 1977, the State University of New York at Stony Brook (Stony Brook) hired respondent, Ernest F. Dube, as an assistant professor in its Africana Studies program. In the fall of 1981, Dube began teaching a course entitled "The Politics of Race." Pet. App. 6a-7a. As the court of appeals observed:

A description of this course, apparently prepared by Dube for the summer term of 1983, made reference to "[t]he three forms of racism and how they manifested

themselves: 1) Nazism in Germany [,] 2) Apartheid in South Africa[, and] 3) Zionism in Israel.”

Id. at 7a. (brackets in original). The court further noted that [a] similar description for the fall, 1983 term stated: “We will . . . end up by discussing the three main forms of racism: overt racism, covert racism, and reactive racism. Examples of all three forms of racism will be discussed for comparative purpose[s]; e.g., Nazism, apartheid, and Zionism.”

Ibid. (brackets in original).

In the summer of 1983, Stony Brook received a complaint from a visiting professor that Dube was teaching students that “Zionism is as much racism as Nazism was racism.” Pet. App. 7a.¹ Dube promptly informed Stony Brook officials that

he had exposed his class to his own view that Zionism was not a monolithic ideology, but that among organizations and individuals identifying themselves as Zionists there were both groups with histories of espousing racist views and others who were not racist, and [he] had urged his students to avoid simplistic and stereotyped thinking.

Id. at 7a-8a. After an investigation by the Executive Committee of the Stony Brook Senate, the Committee determined that Dube’s “teachings [were] within the bounds of academic freedom.” *Id.* at 8a. Petitioner Marburger, Stony Brook’s President, and petitioner Neal, Stony Brook’s Provost, agreed with the Committee’s assessment, as did the majority of the Stony Brook Senate in September 1983. *Ibid.*

Despite these formal actions, the Governor of New York, state legislators, Jewish community groups, and alumni

¹ The visiting professor also published his complaint to the news media. Pet. App. 7a.

allegedly pressured Stony Brook's administration to "repudiate [Dube] and to discontinue * * * teaching of [his course]." Pet. App. 8a. As a result, on October 19, 1983, petitioner Marburger issued a formal press release stating that

[t]he Stony Brook administration, for which [he] speak[s] officially here, absolutely divorces itself from the views expressed in [Dube's] course, and from any view that links Zionism with racism or nazism. Furthermore, [he] personally find[s] such linkages morally abhorrent.

Id. at 9a, 84a. After this press release, Dube's course "was * * * removed from the course listings of the political science department." *Id.* at 9a.

2. Dube became eligible for tenure during the 1983-1984 academic year. Pet. App. 9a. Dube, however, in November 1983 requested "that his tenure review be postponed[,] citing as a reason that '[t]here has been so much noise about [his] course * * * that [he does] not think any objective evaluation is possible right now.'" *Id.* at 39a. Petitioner Marburger granted that request, postponing Dube's tenure review until the following academic year. *Id.* at 9a.²

At that time, petitioner Neville, Stony Brook's Dean of Humanities and Fine Arts, appointed seven faculty members

² In the interim, petitioner Marburger appointed Dube as a lecturer for the 1984-1985 academic year, and as an assistant professor for the 1985-1986 academic year. Pet. App. 39a. As the district court pointed out, Dube

was [also] advised that pursuant to the labor agreement between [Stony Brook] and the United University Professors, Inc. and the policies of the Board of Trustees that in the event that tenure was not granted his employment at Stony Brook would terminate on August 31, 1986.

Ibid.

to an ad hoc committee to review Dube's file and recommend whether he should be tenured and promoted. In the spring of 1985, that committee voted 6-1 in favor of tenuring Dube and 4-3 in favor of promoting him. Pet. App. 10a, 39a.³ Following established procedures, the committee forwarded its recommendations to the "Personnel Policy Committee"—a standing committee elected by the Stony Brook faculty. That committee in early May "voted 4-3 in favor of granting tenure to Dr. Dube and unanimously against promotion." *Id.* at 39a. As the chairman of the committee reported to petitioner Neville:

Professor Dube's understanding of racism, gained primarily through experience, but to some extent through research, is unique at Stony Brook. As a serious and thought-provoking teacher, Dube helps students develop perspectives of this pervasive form of prejudice. There was general agreement that both the quantity and quality of [Dube's] written scholarship was short of the usual standards. Accordingly, there was in our discussion very little support for promotion. Fairness both to other candidates and to the scholarly goals of the University require that we recommend against promotion for the level of scholarly activity reflected by this record.

Id. at 52a.

In late May, Dean Neville, after reviewing the Personnel Policy Committee's recommendations, formally recommended to Provost Neal that Dube be denied tenure and promotion. Pet. App. 11a, 40a; see *id.* at 54a-60a. Neville

³ In a statement issued by the review committee's chairman, the committee stated that "[t]here is no question that Professor Dube's expertise and activities make him an exciting, valuable and not replaceable resource to Africana Studies, students, and the university community." Pet. App. 51a.

noted that “[t]he chief sticking point in Professor Dube’s case is his publications which consist of three items.” *Id.* at 55a. After briefly reviewing and summarizing those publications, Neville stated that, “concerning publication, Professor Dube’s list is not only far shorter than is usually required for tenure, but also does not contain the mature development of an intellectual project we look for in granting faculty tenure.” *Id.* at 56a. On the other hand, Neville observed that “[w]hat is special about Professor Dube * * * is not his service and teaching per se but the experience he brings to it. He is a cultural resource, as it were, a walking library and video collection.” *Id.* at 57a.⁴ In explaining his ultimate recommendation, Neville stated:

Because the virtue of Professor Dube’s historically important experience does not in fact contribute to what is important for tenure, I believe this case in the end turns out to be comparable with other good teacher-citizens whom we turn down because of a poor publication record. Regarding publications alone—and the teaching and service records are quite comparable—Professor Dube has less work in quantity, and of lesser academic maturity, than the other two in the Division against whom I recommended this year. And so I must recommend against Professor Dube.

Id. at 59a.

In July 1985, Provost Neal agreed with Dean Neville’s recommendation, and thus recommended to President

⁴ Dean Neville remarked that “nothing in the file whatsoever supports the kind of criticism raised against Professor Dube last year to the effect that he is a racist, an anti-Zionist, or an anti-Semite.” Pet. App. 54a. He acknowledged that “some elements of the external Jewish community might want to see [Dube] dismissed.” *Id.* at 55a. He concluded, however, that “that desire cannot arise from a thorough reading of [Dube’s] teaching contributions.” *Ibid.*

Marburger that Dube “not be promoted nor granted continuing appointment.” Pet. App. 62a. Neal first observed that the Personnel Policy Committee’s split recommendation was an “exception to standard practice.” *Id.* at 61a. He then stated:

Continuing appointment at a major research university is warranted only when an individual has taken his or her unique experiences, training, background and insights and prodigiously translated them into a form, based on the rigors of scholarly traditions, that can be read and shared by scholars for generations to come.

Ibid. Dube failed to meet that standard, according to Neal, since his “publication record is extremely limited” and “he has not produced the kind of scholarship we require of others whom we award continuing appointment or promote.” *Id.* at 62a.

In August 1985, President Marburger, agreeing with the recommendations of Dean Neville and Provost Neal, recommended denial of tenure and promotion. Pet. App. 12a, 40a; see *id.* at 63a-65a. Marburger explained that his

decision was based on findings by faculty evaluation committees that indicate shortcomings in the area of scholarship. The shortcomings do not have to do with lack of expertise, but rather with evidence that in the words of Provost Neal, your unique experiences, training, background and insights have not been translated into a form, based on the rigors of scholarly traditions, that can be read and shared by scholars for generations to come.

Id. at 65a.⁵

⁵ Marburger also told Dube that “the reasons for non-renewal of [your] contract are not related to the incidents [that prompted Dube’s delaying his tenure review].” Pet. App. 65a.

3. Dube appealed Marburger's decision to petitioner Wharton, Chancellor of the State University of New York.⁶ Under the terms of the collective bargaining agreement between Dube's union and the State of New York (see note 2, *supra*), a three-member advisory committee was convened to review the tenure decision.⁷ That committee unanimously recommended to Chancellor Wharton that Dube be granted tenure without promotion. Before Wharton had reached his decision, however, "the advisory committee's report was disclosed to the press and to * * * a labor organization in competition with [Dube's union], who urged that Dube be tenured." Pet. App. 12a. In view of what Wharton considered a "breach of . . . the basic principles of confidentiality inherent in the tenure review process," *id.* at 13a, he decided to convene a second advisory committee before rendering his decision. Wharton also extended Dube's appointment through February 28, 1987. *Ibid.*

In November 1986, the second advisory committee recommended to Chancellor Wharton that Dube either "receive tenure as an Assistant Professor, or * * * [have his] contract * * * extended for an additional three years (1987-1990)." Pet. App. 70a. In the committee's judgment, Dube "is greatly needed by the Africana Studies Program and is a valuable resource of [the] University." *Ibid.* The committee noted that Dube's "publication record has been below the levels normally considered adequate for promotion and tenure at SUNY/Stony Brook," *id.* at 67a-68a, but also observed that "[f]rom 1983-1986, the problems that

⁶ Wharton stepped down as Chancellor effective February 1, 1987. At that time, Jerome Komisar assumed the office as Acting Chancellor. Pet. App. 14a.

⁷ As the court of appeals explained, "Dube and Marburger each selected one committee member, and those members then selected a third individual to serve as the committee's chair." Pet. App. 12a.

relate to [Dube's] teaching about racism certainly interfered with his research and writing activities," *id.* at 69a.

In January 1987, Chancellor Wharton notified Dube of his final decision denying tenure and promotion. Pet. App. 13a-14a; see *id.* at 71a-73a. In his letter to Dube, Wharton explained that

it is quite clear that research receives a much larger weight [in a tenure decision] on a graduate/research comprehensive university campus [such as Stony Brook] than on a four-year arts and science campus * * *. Your strong record in teaching and in public/community service was not sufficient to offset the deficiency in scholarly publication. This is a conclusion which was made by all parties in the process, including the most recent Chancellor's Advisory Committee.

Id. at 71a. Wharton also acknowledged the controversy surrounding Dube's teaching, and observed that "these extraneous issues — irrelevant to the tenure decision *per se* — will be used both by [your] critics and defenders to interpret whatever decision is made." *Id.* at 72a. He stated that "Stony Brook should be allowed to exercise its judgment that research be given proper weight," but that "you * * * should not be penalized professionally for inaccurate perception of * * * an adverse [tenure] decision." *Ibid.* Accordingly, Wharton offered Dube "an opportunity for a continuing appointment at another campus with the [State University of New York] system providing that such a campus is willing to do so." *Ibid.*⁸

⁸ Wharton extended Dube's appointment through August 1987, in order to help him "pursue the possibility of appointment at one of SUNY's other campuses." Pet. App. 73a. Dube apparently did not pursue that offer. See Pet. 11.

4. In May 1987, Dube filed this federal court action under 42 U.S.C. 1983 against petitioners Wharton, Marburger, Neal, and Neville, and the State University of New York and Acting Chancellor Komisar.⁹ With respect to petitioners, Dube claimed that their adverse tenure decision amounted to a violation of his rights under the First Amendment. Compl. ¶¶ 91-94. Dube sought compensatory and punitive damages and a permanent injunction requiring his appointment to a tenured position at Stony Brook. Pet. App. 14a-15a, 36a-37a.¹⁰

⁹ Several student organizations and Stony Brook professors joined Dube as plaintiffs. The district court dismissed these plaintiffs' claims with prejudice, and plaintiffs sought no further review from that ruling. Pet. App. 5a n.1

With respect to Dube's claims against the State University, the district court held that the Eleventh Amendment barred his claim for damages, but did not bar the claim for injunctive relief. Pet. App. 47a. The court of appeals reversed, holding that the Eleventh Amendment barred each of Dube's claims against the State University. *Id.* at 19a-20a. Dube has sought no further review of that aspect of the court of appeals' judgment. With respect to Dube's claims against Acting Chancellor Komisar, the district court permitted those claims to proceed to trial, but the court of appeals reversed, "find[ing] no support for *any* claim against Komisar." *Id.* at 31a. Dube has not challenged that ruling.

¹⁰ Dube also claimed that petitioners' adverse tenure decision deprived him of property without due process of law, in violation of the Fourteenth Amendment, and that their decision violated state law. Pet. App. 15a. The district court denied petitioners' motion for summary judgment on those separate claims. *Id.* at 44a-47a. The court of appeals dismissed Dube's claim under the Fourteenth Amendment, concluding that Dube "has failed to meet the threshold requirement of establishing a protectable 'liberty' or 'property' interest." *Id.* at 29a-30a. The court of appeals also affirmed the district court's order allowing Dube's pending state law claims to proceed to trial. *Id.* at 31a. Neither Dube nor petitioners have sought further review of these rulings.

Dube also sought a preliminary injunction requiring petitioners to extend his appointment pending the disposition of the lawsuit. The district court denied relief, and Dube did not appeal that ruling. Pet. App. 14a n.3.

After discovery, petitioners in October 1987 filed a motion for judgment on the pleadings or in the alternative for summary judgment. Petitioners asserted, among other grounds, the defense of qualified immunity. Each petitioner also submitted an affidavit, stating that "his recommendation concerning [Dube's] tenure and promotion was based solely on the academic merits, and that the controversy concerning [Dube's course] was not a factor in the decision." Pet. App. 15a; see C.A. App. 213-587. As the court of appeals summarized, "[e]ach affidavit also noted the specific academic considerations taken into account in arriving at the recommendation in question." *Ibid.* In opposition to petitioners' motion, Dube submitted a statement of material facts in issue, under S.D. N.Y. Civ. R. 3(g), based on documents and deposition testimony produced during discovery. See C.A. App. 609-784; Resp. Br. in Opp. 16-45.

5. In October 1988, the district court denied petitioners' motion for summary judgment on Dube's First Amendment claim. Pet. App. 35a-47a. The court first concluded that, given Dube's evidentiary submission, "[t]he trier of facts may reasonably infer that 'but for' the exercise of his First Amendment right of free speech [Dube] would have been granted tenure." *Id.* at 44a. Turning to petitioners' defense of qualified immunity, the court stated that it "understand[s] [Dube's] theory of liability to rest on a claim that the university, through its President and Chancellor, failed to exercise the authority with which it was vested and permitted community outrage over the exercise of his First Amendment rights to deny him tenure." *Id.* at 45a. In these circumstances, the court held,

[t]he defense that [petitioners] had a good faith belief of reasonable university officials that the denial of tenure was "based on [Dube's] file and the standards

applicable at Stony Brook and in light of clearly established law" * * * is not an answer to [Dube's] claim.

Ibid. (citation omitted). Accordingly, the court denied petitioners' motion based on qualified immunity, noting that the "relationship between the exercise of [Dube's] First Amendment rights and the denial of tenure appear to be distant both in time and subject matter." *Id.* at 46a.

6. The court of appeals affirmed. Pet. App. 2a-34a.¹¹ The court of appeals first found that Dube "has proffered evidence from which a jury could find that [petitioners] denied tenure and promotion to him in response to pressure exerted by government officials and community activists outraged by his teaching." *Id.* at 25a.¹² Having "take[n] Dube's assertion of retaliatory motive as true," *id.* at 26a, the court framed the relevant inquiry as follows, namely, "whether, in light of clearly established law, it was objectively reasonable for [petitioners] to believe that denying tenure to Dube in retaliation for the exercise of his First Amendment rights was lawful," *ibid.* The court concluded that "[t]his purely legal question * * * must be answered in the negative, as the facts alleged by Dube unequivocally support his claim of violation of long-standing and clearly established First Amendment law." *Ibid.* The court therefore held that petitioners "are *not* qualifiedly immune from section 1983 liability on Dube's First Amendment claim." *Id.* at 27a.

¹¹ As a threshold matter, the court concluded that it had jurisdiction over petitioners' interlocutory appeal. Pet. App. 21a-23a. In separate concurring opinions, Judges Miner and Mahoney explained their reasons for joining this holding. See *id.* at 32a-34a.

¹² The court cited, "by way of example," President Marburger's statement in October 1983 and Chancellor Wharton's letter to Dube in January 1987. *Id.* at 25a; see p. 3, 8, *supra*.

DISCUSSION

In *Siegert v. Gilley*, 111 S. Ct. 292 (1990), this Court has granted certiorari to resolve a question closely related to the question presented here. In that case — a *Bivens* action based on a federal official's alleged malice¹³ — the question presented is whether, once the defense of qualified immunity is raised, the plaintiff must support his claim with more than conclusory allegations in order to proceed with the litigation. We contend, on behalf of the federal official, that the court of appeals in *Siegert* was correct in imposing such a requirement and in insisting on greater specificity than is required in other contexts in which the defendant's state of mind is an element of the claimed wrong. We further contend that this requirement is essential if the defense of qualified immunity is to have the substantive scope and effect mandated by this Court's decisions in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and related cases.¹⁴

The present case, like *Siegert*, is one in which a critical element of the claimed constitutional violation is the state of mind of the government officials who are defendants in the action. (While this action, unlike *Siegert*, arises under 42 U.S.C. 1983, the Court has made plain that the scope of qualified immunity in the *Bivens* context and in an action under Section 1983 is generally the same. See *Harlow v. Fitzgerald*, 457 U.S. at 818 n. 30; *Butz v. Economou*, 438 U.S. 478, 504 (1978).) But unlike the court of appeals' decision in *Siegert*, and the decisions of other courts of

¹³ *Bivens v. Six Unknown Named Narcotics Agents*, 403 U.S. 388 (1971). In *Siegert*, petitioner alleged, among other claims, that respondent, an official at the government facility where petitioner had been employed, violated petitioner's constitutional rights by maliciously and in bad faith giving an unfavorable reference to petitioner's prospective employer.

¹⁴ We have provided copies of our brief in *Siegert* to the parties in this case.

appeals that have adopted a similar approach, it is not clear whether the court below applied the rigorous standard that we believe the qualified immunity defense requires in determining whether a case should be allowed to proceed.¹⁵ Indeed, the court of appeals in this case appears to have allowed the plaintiff to continue the litigation on the basis of the sort of conclusory allegations that the *Siegert* court refused to countenance. This is of especial concern in a case, such as this, in which the defendants' state of mind is central to the plaintiff's cause of action.

Under these circumstances, we believe that reconsideration by the court below may be warranted on the basis of this Court's decision in *Siegert*. We therefore recommend that the petition be held for disposition in light of the Court's decision in that case.

¹⁵ Cf. *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981) ("Something more than a fanciful allegation is required to justify denying a motion for summary judgment when the moving party has met its burden of demonstrating the absence of any genuine issue of material fact.").

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *Siegert v. Gilley*, cert. granted, 111 S. Ct. 292 (1990).

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FEBRUARY 1991

* The Solicitor General is disqualified in this case.

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OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

CLIFTON R. WHARTON, JR., ex-Chancellor of the State University of New York, individually and in his official capacity; JOHN MARBURGER, President of the State University of New York at Stony Brook, individually and in his official capacity; HOMER NEAL, Provost of the State University of New York at Stony Brook, individually and in his official capacity, ROBERT NEVILLE, Dean of Humanities and Fine Arts at the State University of New York at Stony Brook, individually and in his official capacity,

Petitioners,

—against—

PROFESSOR ERNEST F. DUBE,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	2
CONCLUSION	5

TABLE OF AUTHORITIES

CASES

<u>Halperin v. Kissinger (Halperin II)</u> , 807 F.2d 180 (D.C. Cir. 1986)	3
<u>Matsushita Electric Industrial Co. v Zenith Radio Corp.</u> , 475 U.S. 574 (1986)	2
<u>Mitchell v. Forsyth</u> , 472 U.S. 511	5
<u>Siegert v. Gilley</u> , 111 S. Ct. 292 (1990)	2,3,5
<u>Smith v. Nixon</u> , 807 F.2d 197 (D.C. Cir. 1986)	3

MISCELLANEOUS

<u>Rudovsky, The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights</u> , 138 U. Pa. L. Rev. 23, 70-72 (1989)	4
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No. 90-549

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CLIFTON R. WHARTON, JR., ex-Chancellor of the State University of New York , individually and in his official capacity; JOHN MARBURGER, President of the State University of New York at Stony Brook, individually and in his official capacity; HOMER NEAL, Provost of the State University of New York at Stony Brook, individually and in his official capacity; ROBERT NEVILLE, Dean of Humanities and Fine Arts at the State University of New York at Stony Brook, individually and in his official capacity,

Petitioners,

-against-

PROFESSOR ERNEST F. DUBE,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

INTRODUCTION

The United States, as Amicus Curiae, has filed a brief in this case which recommends that the petition for certiorari be

held for disposition until this Court's decision in Siegert v. Gilley, 111 S.Ct. 292 (1990). Respondent respectfully disagrees with this recommendation.

ARGUMENT

Neither the Brief Amicus Curiae of the United States nor the Brief for the Respondent in Siegert v. Gilley address the standard which should govern this case, which is postured after the conclusion of discovery rather than at the pleading stage.¹ For a case which is postured at the pleading stage, the United States argued as Respondent in Siegert that a plaintiff "may not rely on subjective allegations, . . . attenuated inferential and circumstantial allegations, . . . or otherwise conclusory allegations . . . Rather, the plaintiff must set forth objective facts that are 'specific and concrete' and 'raise a genuine issue as to the objective reasonableness of the defendant's conduct." Brief for the Respondent in Siegert v.

¹The Brief of the United States does not endorse the argument of the petition for certiorari (at 24-30) that some variation of the test articulated by this Court in Matsushita Electric Industrial Co. v Zenith Radio Corp., 475 U.S. 574 (1986) should apply.

Gilley at p. 21, n.13.(emphasis in original). This test is extracted from two D.C. Circuit opinions, Smith v. Nixon, 807 F. 2d 197, 201 (D.C. Cir. 1986) and Halperin v. Kissinger (Halperin II), 807 F. 2d 180 (D.C. Cir. 1986), which dealt with the exigencies of national security investigations.

In addition to the fact that Wharton v. Dube does not involve national security issues, the concrete reality of the pending case is that every one of four seasoned federal judges who examined respondent's evidence were convinced that the evidence met the test outlined in the Siebert brief. See generally, Wharton v. Dube, Respondents Brief in Opposition.

Therefore, a decision by this Court affirming the decision of the D.C. Circuit that petitioner in Siebert did not produce enough evidence at the pleading stage to entitle him to discovery, should have no bearing on the fact that Wharton v. Dube is not certworthy in its present posture since respondent Dube produced more than sufficient evidence. A decision to hold this case pending a decision in Siebert will only delay the movement of the case for no appreciable purpose.

Respondent respectfully suggests a number of perils which will follow from a decision to review the sufficiency of the evidence adduced by respondent Dube after discovery. First, such a decision will increase to three the number of opportunities for defendants in similar cases to come to this Court raising the same claims during the pendency of one litigation. Whether the appeal is at the pleading stage, at the completion of discovery, or after final judgment, respondent suggests that such multiple appeals will enormously delay litigation and make trials vastly more complicated because of the diminution of human memory. Cf. Rudovsky, The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights, 138 U. Pa. L. Rev. 23, 70-72 (1989). Although respondent recognizes the need for governmental immunity from trials on frivolous allegations, appellate review at the pleading stage and post-trial review of a final judgment should be adequate to serve this purpose.

Furthermore, review of this case at post-discovery will contribute to the decreasing importance of the traditional Rule

56 criteria for resolving summary judgment motions in qualified immunity cases. The severe disputes of material fact in this case seem to have been overlooked in the haste to address the qualified immunity issue. These factual disputes are clear from the briefs filed and indicate that this case is totally inappropriate for resolution on summary judgment. The issue of immunity in this case is not a "purely legal one" as counseled by the Court in Mitchell v. Forsyth, 472 U.S. 511, 528 n. 9. Rather, it is entangled in a complicated factual morass that should be worked out in the first instance by the trier of fact.

Furthermore, since this action "involves claims for injunctive relief that will have to be adjudicated regardless of the resolution of any damage claims," Mitchell v. Forsyth, 472 U.S. at 519, n.5 Supreme Court review of this matter at this stage is even more inappropriate.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should not be held pending disposition in Siegert v. Gilley, but

should be denied forthwith.

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OCTOBER TERM, 1990

CLIFTON R. WHARTON, JR., ex-Chancellor of the State University of New York, individually and in his official capacity; JOHN MARBURGER, President of the State University of New York at Stony Brook, individually and in his official capacity; HOMER NEAL, Provost of the State University of New York at Stony Brook, individually and in his official capacity; ROBERT NEVILLE, Dean of Humanities and Fine Arts at the State University of New York at Stony Brook, individually and in his official capacity,

Petitioners,

—against—

PROFESSOR ERNEST F. DUBE,

Respondent.

**PETITIONERS' RESPONSE TO THE BRIEF FOR
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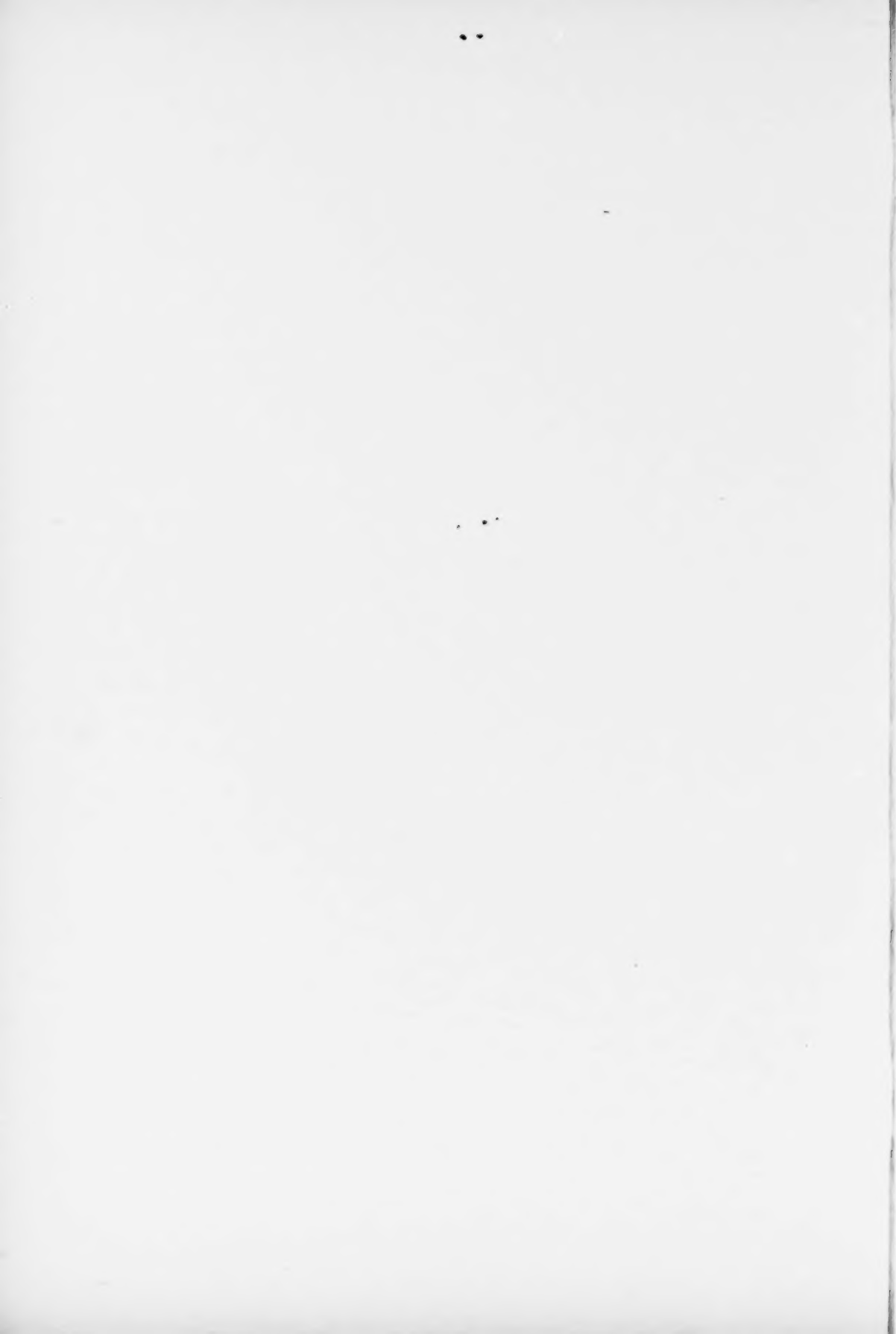


TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT	
THE PETITION SHOULD BE GRANTED IN ORDER TO RESOLVE CONCLUSIVELY THE CONFLICT AMONG THE CIRCUITS CONCERN- ING THE STANDARD THAT MUST BE MET BY PLAINTIFFS ALLEGING MOTIVE-BASED CLAIMS WHERE PUBLIC OFFICIAL DEFEN- DANTS SEEK SUMMARY JUDGMENT AS TO QUALIFIED IMMUNITY.	2

TABLE OF AUTHORITIES

Cases:	PAGE
<i>DiMartini v. Ferrin</i> , 889 F.2d 922 (9th Cir. 1989), opinion amended and rehearing denied, 906 F.2d 465 (9th Cir. 1990), petition for cert. filed, No. 90-660 (October 1990)	3, 4
<i>Martin v. D.C. Metropolitan Police Department</i> , 812 F.2d 1425, partially vacated en banc and rehearing granted, 817 F.2d 144, reinstated en banc and rehearing denied sub nom. Bartlett on behalf of <i>Neuman v. Bowen</i> , 824 F.2d 1240 (D.C. Cir. 1987)	3, 4
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	4
<i>Siebert v. Gilley</i> , 895 F.2d 797 (D.C. Cir.), cert. granted, 111 S. Ct. 292 (1990)	2, 3, 4

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Petitioners,

—against—

PROFESSOR ERNEST F. DUBE,

Respondent.

**PETITIONERS' RESPONSE TO THE BRIEF FOR
THE UNITED STATES AS AMICUS CURIAE**

Petitioners respectfully submit this response to the brief for the United States as *amicus curiae* ("U.S. Br.") which was submitted at the invitation of this Court.

THE PETITION SHOULD BE GRANTED IN ORDER TO RESOLVE CONCLUSIVELY THE CONFLICT AMONG THE CIRCUITS CONCERNING THE STANDARD THAT MUST BE MET BY PLAINTIFFS ALLEGING MOTIVE-BASED CLAIMS WHERE PUBLIC OFFICIAL DEFENDANTS SEEK SUMMARY JUDGMENT AS TO QUALIFIED IMMUNITY.

Petitioners concur with the United States' view that "the Court of Appeals in this case appears to have allowed the plaintiff to continue the litigation on the basis of the sort of conclusory allegations that the [D.C. Circuit] refused to countenance" in *Siebert v. Gilley*, 895 F.2d 797 (D.C.Cir.), *cert. granted*, 111 S. Ct. 292 (1990). U.S. Br. at 13.¹ Indeed, petitioners submit that it is clear that the court below did *not* "appl[y] the rigorous standard that [the United States] believe[s] the qualified immunity defense requires in determining whether a case should be allowed to proceed." *Id.* Given the manner in which the issues in *Siebert* have now been framed, however, the Court may not reach the more central issue presented here: what sort of evidence is a plaintiff required to adduce, especially after ample opportunity for discovery, to defeat a well-supported summary judgment motion seeking qualified immunity as to motive-based claims.

The Court may reverse in *Siebert* on the sole basis that he should have been permitted limited discovery. Conversely, the United States has asserted that the Court may affirm the lower court's decision in *Siebert* without addressing the question of what standard should apply to the proof presented on

1 Petitioners are also generally in accord with the United States' statement of the case but note that although the political science department removed Dube's course from its cross-listings (U.S. Br. at 3), the course continued to be listed in the University catalogue and taught by Dube (as AFS 319, rather than AFS/POL 319). (See Petition at 6). None of the petitioners was a member of the political science department.

summary judgment.² In either event, it will leave unresolved the present conflict among the circuits as to the appropriate standard to apply on summary judgment, particularly where discovery has been allowed.

Significantly, in his Petition for a Writ of Certiorari in *DiMartini v. Ferrin*, 889 F.2d 922 (9th Cir. 1989), *opinion amended and rehearing denied*, 906 F.2d 465 (9th Cir. 1990), *petition for cert. filed*, No. 90-660 (October 1990), the Solicitor General urged the Court not to remand for further consideration in light of *Siebert* but rather "to grant the petition in this case and to set the case for argument in tandem with *Siebert* so that the Court can *fully* address the practical problems raised by the litigation of qualified immunity claims." Petition, *Ferrin v. DiMartini*, at 25. (Emphasis supplied). He observed that "[t]he *Siebert* case involves a challenge to the 'heightened pleading standard,' whereas this case involves the adequacy under the summary judgment rule of the plaintiff's proof in support of his allegations," and that both *DiMartini* and *Siebert* "raise oft-recurring questions of considerable practical importance to the disposition of *Bivens* cases." *Id.* The same reasoning is applicable here.

A comparison of the reasoning in *DiMartini* with that in *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, *partially vacated en banc and rehearing granted*, 817 F.2d 144, *reinstated en banc and rehearing denied sub. nom. Bartlett on behalf of Neuman v. Bowen*, 824 F.2d 1240 (D.C.

2 The United States appears to propose a test turning upon whether a plaintiff has set forth "objective facts." Brief for the Respondent, *Siebert v. Gilley*, at 20-21 n.13. The manner in which that phrase is defined, however, renders the test somewhat circular. We are instructed, for example, that "the plaintiff must set forth his allegations with sufficient precision and factual specificity to negate the claim of immunity" (*id.* at 17), that the facts alleged must be "'specific and concrete' and 'raise a genuine issue as to the objective reasonableness' of the defendant's conduct" (*id.* at 20-21 n.13), and that a "weak circumstantial allegation . . . does not overcome an official's defense of immunity" (*id.* at 27). These formulations, however, are themselves subjective and thus difficult for courts to apply in a consistent fashion.

Cir. 1987), starkly underscores the existing conflict. In *DiMartini*, for example, the Ninth Circuit posits that on motions for summary judgment as to qualified immunity "a greater tolerance of speculation and inference must be afforded." 889 F.2d at 927. In *Martin*, conversely, the D.C. Circuit insists that the "plaintiff . . . come forward with something more than inferential or circumstantial support for his allegations of unconstitutional motive." 812 F.2d at 1435. While *Martin* proposes a standard more demanding of plaintiffs in qualified immunity cases (*id.*), *DiMartini* proposes precisely the opposite—a relaxation of the standards which would otherwise apply to plaintiffs in such cases. 889 F.2d at 926-27.

Of the three cases now before the Court on the issue of qualified immunity standards, only the petition here proposes adopting the summary judgment standards applied by this Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and other antitrust cases. The *Matsushita* standard would be clear and easy to apply. Unlike the solution proposed by the United States in *Siegert* (see note 2 above) the *Matsushita* test looks to the function of the evidence offered, not its quantity or its "strength." If the evidence addresses and tends to exclude the explanation offered by a defendant for his actions, it meets the plaintiff's burden. If it merely offers an alternative hypothesis for that conduct, without attacking the factual basis for defendant's hypothesis, it is inadequate to withstand summary judgment. This test would ensure a more uniform application of qualified immunity standards while vindicating the interests the Solicitor General seeks to protect.

By hearing all three cases, the Court would be presented with an opportunity to deal with the substantial questions presented in these cases in a comprehensive fashion. Accordingly, petitioners respectfully request that the Court grant their petition and set the case for argument.

Dated: New York, New York
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